92-671

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1992

DWIGHT H. OWEN

Petitioner

v.

HELEN OWEN

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Supreme Court decision in Farrey v Sanderfoot, ___ US ___, 111 S Ct 1825, 114 L Ed 2d 337 (1991), which denied lien avoidance under 11 USC 522(f) as to lien created by a state divorce judgment in order to protect a pre-existing ownership interest of a non-debtor spouse in specific property (and hence protect the distribution under the decree) controls the decision in Owen where, in Owen, no joint or pre-existing ownership interest in specific property was ever shared by the debtor and creditor, and where the lien was not created by the specific terms of any judgment and where avoidance of the lien would, in no way, result in a deprivation of any ownership interest of the creditor or otherwise defeat any property distribution in favor

of that creditor under such judgment.

2. Whether the Court of Appeals, in Owen, misapplied Farrey when it concluded that there was no "fixing of a lien on an interest of the debtor...as the debtor had no property interest prior to the fixing of the lien" where, in Owen, the debtor's ownership of property is an indispensable prerequisite to the acquisition of any lien by his creditor under Florida law.

3. Whether the apparent rule of Farrey should be limited or narrowed to the extent that it not be applied to the broader category of general judgment liens, such as the one involved in Owen, which arise by random operation of law, and where no ownership-to-lienholder continuum exists in the creditor and where avoidance of such lien will not result in any deprivation of any pre-existing ownership interest held by the creditor in the property.

STATEMENT PURSUANT TO RULE 14.1(b)

Dwight H. Owen is an individual Petitioner

Helen Owen is an individual Respondent

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OPINIONS BELOW

The 14 May 1992 decision of the United States Court of Appeals for the Eleventh Circuit is reported at 961 F 2d 170 and is reprinted in the Appendix to this petition at (A1). That decision was rendered upon remand from the United States Supreme Court following the decision in Owen v Owen, ___ US ____, 111 S Ct 1833, 114 L Ed 2d 350 (1991). See reprint of that decision at (A 12). The prior decision of the United States Court of Appeals is reported at 877 F 2d 44 and is reprinted at (A 49). The decision of the United States District Court, Middle District of Florida, is reported at 86 BR 691 and is reprinted at (A 62). The decision of the United States Bankruptcy Court, Middle District of Florida was not reported but is reprinted at (A 73).

In addition to the foregoing opinions, the opinion of the United States Supreme Court in Farrey v Sanderfoot, ___ US ___, 111 S Ct 1825, 114 L Ed 2d 337 (1991) published the same day as the decision in Owen v Owen, above, is also reprinted at (A 77).

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was entered, after remand from the United States Supreme Court, on the 14th day of May 1992. (A1). That decision affirmed the prior decision of the United States District Court, Middle District of Florida, which had been entered on the 7th day of June 1988. (A62). Petitioner timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc, pursuant to 11th Circuit Rule 35-2. These were denied by the Court of Appeals on the 21st day of July 1992. (A106).

This Court has jurisdiction pursuant to 28 USC 1254(1).

STATUTES INVOLVED

Title 11, United States Code, Section 522(b) and Section 522(f) are reprinted at (A 110).

Section 222.20, Florida Statutes is reprinted at (A 113).

Section 55.10, Florida statutes is reprinted at (A113).

CONSTITUTIONAL PROVISIONS INVOLVED

Article X, Section 4, Florida Constitution is reprinted at (A114).

Article XI, Section 5, Florida Constitution is reprinted at (A 116).

STATEMENT OF THE CASE

I. INTRODUCTION

This case was previously before this Court. Owen v Owen, ___ US ___, 111 S Ct 1833, 114 L Ed 2d 350 (1991). (A 12). The foregoing decision reversed the prior decision of the United States Court of Appeals for the Eleventh Circuit, 877 F 2d 44, (A 49), and remanded the case for consideration in light of this Court's decision in Farrey v Sanderfoot, ___ US ___, 111 S Ct 1825, 114 L Ed 2d 337 (1991). (A 77). Following consideration on remand, the Court of Appeals again affirmed the decision of the United States District Court, Middle District of Florida. (A 1), The District Court had affirmed the decision of the United States Bankruptcy Court, Middle District of Florida, which had denied Petitioner's Motion to Avoid Res-

pondent's judgment lien, pursuant to 11 USC 522(f)(1), upon Petitioner's homestead.

The decision of the Court of Appeals on remand construed and applied this Court's holding in Farrey v Sanderfoot, above. The Court of Appeals concluded that the holding in Farrey applied in Owen and that the Petitioner could not avoid Respondent's lien because Petitioner did not own the property interest to which the lien attached "at some point before" the lien attached to that interest. See 961 F 2d at 172. (A5-6). The issue determined by the Court of Appeals was one which this Court specifically left undecided in the Owen opinion. See 111 S Ct at 1836 and 1838. (A 19)(A 29-30). At 111 S Ct 1836, the opinion states

> "The lien in the present case is a judicial lien, and we assume without deciding that it fixed 'on an interest of the debtor in property.'"

At 111 S Ct 1838, the Court states

> "It could be argued that the lien did not fix 'on an interest of the debtor' (cite)...We express no opinion on these points..."

The Court of Appeals concluded that there was no fixing of a lien on Petitioner's interest in the property. 961 F 2d 172. (A 4).

II. THE FACTS

The facts are not disputed. The Respondent obtained a money judgment against the Petitioner in Circuit Court, Manatee County, Florida in Decembe 1975. A certified copy of that judgment was recorded in the public records of Sarasota County, Florida on 29 July 1976. At that time Petitioner owned no property in Sarasota County.

On 27 November 1984, Petitioner acquired record fee ownership of the real property at issue herein, Unit 304 of Embassy

House, a condominium, located in Sarasota County. At that time, Petitioner was a single man and not "the head of a family" as was then required for entitlement to the Florida constitutional homestead exemption. Article X, Section 4, Fla. Const. (A 114).

On 6 November 1984, the citizens of Florida approved an amendment to the constitutional homestead provision which substituted "a natural person" for the previous "head of a family" requirement. That amendment became effective on 8 January 1985. Article XI, Section 5, Fla. Const. (A 116).

Under Florida law, no judgment is a lien upon any property until property is owned by the judgment debtor. First National Bank of Chipley v Peel, 145 So 177 (Fla 1933); Bowers v Mozingo, 399 So 492 (Fla 3d DCA 1981). A duly recorded

judgment against a debtor becomes a lien upon that debtor's real property at the time the debtor acquires ownership of real property in the county in which that judgment is recorded. B. A. Lott, Inc. v Padgett, 14 So 2d 667 (Fla 1943). Thus, the Respondent's judgment attached as a lien at the time the above property was acquired by petitioner on 27 November 1984. In addition, a judgment which attaches as a lien upon the debtor's property at a time when the debtor is not eligible to claim the homestead exemption will remain enforceable despite the fact that the debtor later qualifies for the exemption. Aetna Insurance Company v LaGasse, 223 So 2d 727 (Fla 1969). Although the attachment of such a lien does not prevent subsequent acquisition of the homestead right, see Lamb v Ralston Purina Company, 21 So 2d 127 (Fla 1945), such a lien will remain enforceable

even as to homestead property. See Porter-Mallard Company v Dugger, 157 So 429 (Fla 1934). As a result, under state law the Respondent's lien remained enforceable despite the acquisition of the right to assert the exemption.

On 13 January 1986, the Petitioner filed his Chapter 7 bankruptcy petition and claimed the above property as exempt as his homestead on his B-4 schedule, in accordance with Chapter 222.20, Florida Statutes (A113), the provision which limits Florida debtors to state, rather than federal,exemptions in bankruptcy. The bankruptcy court allowed the exemption for purposes of general administration of the estate. The exemption was allowed because exemption entitlements are determined by reference to the exemption provisions in effect on the date of the filing of the petition. 11 USC 541, In Re Zahn

605 F 2d 323 (7th Cir 1979) cert den 444 US 1075, 100 S Ct 1072, 62 L Ed 2d 757 (1980); Lewis v Manufacturer's National Bank, 364 US 603, 81 S Ct 347, 5 L Ed 2d 323 (1961).

In due course, the Petitioner received his bankruptcy discharge. Thereafter, the court permitted the case to be re-opened, at Petitioner's request, for the purpose of filing a motion to avoid Respondent's lien pursuant to 11 USC 522(f). The order of February 8, 1988 (A73), in which the bankruptcy court held the lien to be unavoidable, is the order appealed to the District Court and to the Court of Appeals. The District Court (A 62) and Court of Apeals (A 49) both affirmed the bankruptcy court.

The United States Supreme Court granted certiorari and reversed the decision of the Court of Appeals, Owen v Owen, above, holding that state defined exclusions from exemptions did not preclude

lien avoidance under 11 USC 522(f)(1). However, this Court remanded the case to the Court of Appeals for consideration in accordance with the holding in Farrey v Sanderfoot, above. (A 30).

The Owen decision, at 111 S Ct 1838, (A 29), states

> "Section 522(f) permits the avoidance of the 'fixing of a lien on an interest of the debtor'. Some court's have held it inapplicable to a lien that was already attached to property when the debtor acquired it, since in such a case there never was a 'fixing of a lien' on the debtor's interest. (cites omitted). Under Florida law, the lien may have attached simultaneously with the acquisition of the property interest. If so, it could be argued that the lien did not fix 'on an interest of the debtor'. Farrey v Sanderfoot, ___US____, 111 S Ct 1825, 114 L Ed 2d 337 (1991)."

This latter issue was left for consideration on remand.

In again affirming the District Court, the Court of Appeals stated at 961 F 2d 172 (A 4-6) that

> "...there was no fixing of a lien

> on an interest of the debtor... (and) there was never a fixing of a lien on an interest of the debtor, as the debtor had no property interest prior to the fixing of the lien."

The Court of Appeals, in relying on Farrey, apparently took the position that the Petitioner failed to meet the requirement that he own an interest in the property to which the lien attached "at some point before" the lien attached to the property. See Farrey, at 111 S Ct 1831. It was on this basis that the Court of Appeals held the lien to be unavoidable. See 961 F 2d at 172. (A 4-6).

ARGUMENT

I

In concluding that Respondent's lien was unavoidable, pursuant to 11 USC 522(f), the Court of Appeals misapplied this Court's holding in Farrey. The holding in Farrey is not as broad as the Court of Appeals has interpeted it to be.

Farrey involved the limited situation wherein ownership interests in specific real property were at risk had this Court sustained lien avoidance under 11 USC 522. Farrey involved the lien created by a divorce decree where that decree was engineered to protect a pre-existing ownership interest. The non-debtor spouse received a judicially declared lien upon the property which was transferred by that decree to secure to her the division of property ordered by the divorce court. This Court

held that the lien created by that judgment in favor of the non-debtor spouse could not be avoided.

The boundaries of the Farrey ruling are stated at 111 S Ct 1827, (A 77),

> "In this case we consider whether §522(f) of the Bankruptcy Code allows a debtor to avoid the fixing of a lien on a homestead, where the lien is granted to the debtor's former spouse under a divorce decree that extinguishes all previous interests the parties had in the property, and in no event secures more than the value of the non-debtor spouse's former interest. We hold that it does not."(emphasis added).[1]

This Court's concern for Farrey's pre-existing ownership interest is again noted at

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1. Two conditions are noted here, i.e. (1) a decree which extinguishes a pre-existing ownership interest and (2) a lien which secures no more than the value of the non-debtor spouse's former interest. Thus, in the non-debtor spouse, a ownership-to-lienholder continuum exists.

Since the Respondent here, Mrs Owen, never had an ownership interest in the property which became the subject of her lien when Petitioner acquired the property, she does not fall within the protection of Farrey. She can fulfill neither of the above (2) conditions. Further, her lien did not arise by way of any divorce decree.

> "Farrey obtained the lien not to defeat Sanderfoot's pre-existing interest in the homestead but to protect her own pre-existing interest in the homestead that was fully equal to that of her spouse. The divorce court awarded the lien to secure an obligation the court imposed on the homestead in exchange for the court's simultaneous award of the wife's homestead interest to the husband."(emphasis added).

Viewed in its entirety, the transfer under the Farrey divorce decree is more akin to a partition judgment or a purchase money mortgage than to the more commonplace lien of an unrelated judgment such as the lien held by the Respondent in Owen. Mrs Owen's lien arose by operation of law and attached to property indiscriminately. See §55.10, Florida Statutes. Respondent Owen never held a pre-existing ownership interest in Petitioner's property. Mrs Owen's lien, unlike Farrey's, never provided her with a specific interest in Petitioner's property. Farrey's lien was specifically

created by the terms of the decree. Mrs Owen's lien was not of that character, origin or magnitude.[2] It should not be accorded the same magnitude of protection that was accorded Farrey's.

Also, as the Court noted at 111 S Ct 1828, (A 82), the Farrey decision evolved from a series of dissolution of marriage

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2. No interest in specific property is created by virtue of the attachment of a judgment as a lien. In Conard v The Atlantic Insurance Company of New York, Inc., 26 US(1 pet) 386, 442-443 (1828), the Supreme Court, in construing Pennsylvania lien law, stated

> "...it is not understood that a general lien by judgment on land, constitutes, per se, a property or right in the land itself. It only confers a right to levy on the same to the exclusion of other adverse interests, subsequent to the judgment...But subject to this the debtor has full power to sell or otherwise dispose of the land. His title to it is not devested or transferred by the judgment to the judgment creditor...In short, a judgment creditor has not jus in re, but a mere power to make his general lien effectual by following up the steps of the law, and consummating his judgment by an execution and levy on the land."

Florida has adopted the rule set forth above. In Massey v Pineapple Orange Company, 87 Fla 374, 100 So 170 (Fla 1924) the court states

> "A general lien by judgment on land only confers a right to levy on the same...A

cases which present equities not to be found in Owen. It appears, in Farrey and in other similar cases noted, that an underlying factor was the desire of the courts to protect pre-existing interests (in Farrey, an ownership interest) of a non-debtor spouse.[3] Mrs Owen was never at such a risk

2. (cont.)judgment creditor has no jus in re, but a mere power to make his general lien effectual by following up the steps of the law and consummating his judgment by an execution and levy upon the land."

See also Gilpen v Bower, 12 So 2d 884 (Fla 1943), wherein the Court distinguishes mortgages and judgment liens and concludes that a judgment lien was not a claim upon specific property. See also Nassau Realty Company Inc. v City of Jacksonville, et al., 198 So 581 (Fla 1940)(distinguishing judgment liens and liens on specific property); Young v McKenzie, 46 So 2d 184 (Fla 1950)(following Massey, above); Smith v Pattishall, 127 Fla 474, 176 So 568 (Fla 1937)(same).

3. Note at 111 S Ct 1828 (A 85)

"The sole question presented in this case is whether §522(f)(1) permits Sanderfoot to avoid the fixing of Farrey's lien on the property interest that he obtained in the divorce decree."

Without the relief provided by this Court, Farrey would have parted with her ownership interest in return for the security of the lien given by the divorce decree, only to have the security of the lien stripped from her when the former spouse, who acquired her prior interest in the property, later sought bankruptcy relief. Without relief in this Court she would have suffered a two-fold deprivation which, in the end, would have taken from her the entirety of the property she once owned.

because her lien was never a substitute for a prior ownership interest in any property.

In restating its desire to protect Farrey's pre-existing ownership interest, and the lien given to secure that interest, the Court notes at 111 S Ct 1831, (A 97),

> "...to permit a debtor in these circumstances to use the code to deprive a spouse of this protection would neither follow the language of the statute nor serve the main goal it was designed to address." (emphasis added)

The Petitioner concedes that a lien arising under the circumstances of Farrey would not likely have been the evil which Congress sought to remedy when §522(f) was enacted.[4] However, those peculiar circumstances are not present in Owen. Avoiding Mrs Owen's lien would not deprive her of something she once owned, it would merely deprive her of

4. The Court, in Farrey, assumed, but did not determine, that the lien involved in that case was a judicial lien. See 111 S Ct 1828, (A 85). However, in Owen, the Court specifically stated that, "The lien in the present case is a judicial lien..." (A 19).

an opportunity to acquire something she never previously had. Her interests were never equivalent to those of Farrey and such interests as Mrs Owen had are not worthy of the protection of the Farrey rule as interpreted by the Court of Appeals in its recent decision.

II

The issue which this Court directed the Court of Appeals to consider on remand is stated at 111 S Ct 1838, (A 29), as follows

> "Under Florida law, the lien may have attached simultaneously with the acquisition of the property interest. If so, it could be argued that the lien did not fix 'on an interest of the debtor'. See Farrey v Sanderfoot, ___US ____, 111 S Ct 1825, ___ L Ed 2d ____ (1991)."

The actual language of the holding in Far-

rey, at 111 S Ct 1829, (A 87),

> "...unless the debtor had the property interest to which the lien attached at some point before the lien attached to that interest, he or she can not avoid the fixing of the lien under the terms of 11 USC 522(f)(1)." (emphasis added)

Quite obviously, this Court did not conclude in its Owen opinion that the above rule required that lien avoidance be denied to Petitioner Owen.[5] However, the Court of Appeals, at 961 F 2d 172, held (A 4-6)

> "...there was no fixing of a lien on an interest of the debtor... (and) there was never a fixing of a lien on an interest of the debtor, as the debtor had no property interest prior to the fixing of the lien."

This holding can not be sustained, so as deny Petitioner the avoidance of the lien, under the facts of this case.

Florida law clearly provides that a judgment can be no lien upon any property

5. Note at 111 S Ct 1838, (A 29), wherein the Court states with reference to the issues remanded that

> "It could be argued that the lien did not fix 'on an interest of the debtor'. (cite) ... We express no opinion on these points..."

unless and until property is owned by the judgment debtor.[6] A judgment attaches as a lien to the judgment debtor's property

6. The conclusion, i.e that there "...was no fixing of a lien on an interest of the debtor..." could only be true in a situation like that presented in In Re McCormick, 18 BR 911 (Bankr WD Pa 1982) aff'd 22 BR 997 (DC WD Pa 1982), noted by this Court in Owen, 111 S Ct 1838. In McCormick, the lien attached to a joint interest prior to the time that the debtor acquired sole interest in the property. Because the lien attached prior to acquisition of his sole interest, the debtor did acquire the property with the lien already attached. Under those facts, it can be observed that there was no fixing of a lien on an interest of the debtor because the lien became fixed while owned by the prior titleholders, i.e. the joint judgment had attached during the prior joint ownership and therefor the lien was already attached to the property when it became solely owned by the debtor.

This is plainly not what occurred in Owen, because Mrs Owen's judgment was against Owen himself and not against Owen's predecessor in title. For Mrs Owen to have had a lien on the property prior to Owen's acquisition of his interest, Mrs Owen's judgment would have had to have derived from Owen's predecessor in title, rather than through Owen himself.

The opinion of the Court of Appeals reads as though McCormick applies. Quite clearly, it does not. See In Re Sprick, 78 BR 292 (Bankr D Kan 1987) for an analysis of McCormick and an explanation of when it does not apply.

and to none other.[7] In Owen, there was no lien in favor of the creditor until Petitioner acquired title in November 1984. The judgment attached as a lien upon the Petitioner's interest in the property because, by definition, it could not attach to anything else.

Because the lien was "dependent" upon Petitioner's ownership, it is clear that "ownership" was the condition "precedent" to the very existence of the lien. Farrey, at 111 S Ct 1829, (A 87), requires that the debtor have the property interest to which the lien attached "at some point before" the lien attached to the interest.

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7. See Cheves et al. v First National Bank of Gainesville, 79 Fla 34, 83 So 870 (Fla 1920)(a judgment is no lien upon land before acquisition of title); First National Bank of Chipley v Peel, 107 Fla 413, 145 So 177 (Fla 1933)(judgment lien could not attach to property until it was owned by the judgment debtor); Baron v Aiello, 319 So 2d 198 (Fla 3d DCA 1975); Bowers v Mozingo, 399 So 2d 492 (Fla 3d DCA 1981); Accent Realty of Jacksonville, Inc., v Crudele, 496 So 2d 158 (Fla 3d DCA 1986) (creditor may not acquire judgment lien on property to which judgment debtor does not hold legal title).

The phrase "at some point before" is not further defined in Farrey. The Court of Appeals, in Owen, concluded that there was no fixing of a lien on an interest of the Petitioner because the Petitioner had no property interest "at some point before" the lien attached. See 961 F 2d 172, (A 4-6). However, this conclusion is not sound because the creditor had no lien until acquisition of the property by the Petitioner. Thus, a sequence of events exists in which "ownership" must first occur.[8] Pimbe's case[9] provides an illustration of how the "at some point before" rule should apply in Owen. Pimbe's case involved the operation of the Statute of Uses. In that case, land was transferred to one Throckmorton for the use of his transferor. Throckmorton was then convic-

8. The reverse could never be true. A lien is entirely dependent upon the existence of ownership for its existence. See note #7 and cases cited.
9. 72 Eng Rep 528 (1585). See Scott & Scott, Selected Cases and Other Authorities on the Law of Trusts 286 (5th Ed. 1966).

ted of treason which had been committed prior to the transfer. As a result, the land was forfeited to the crown at the moment of its transfer to Throckmorton. The use could not be enforced against the crown and was therefore not executed by the Statute. Because Throckmorton was seised of the land, for an "instant", at the time of his treason, the forfeiture occurred.[10]

Even though events appear to occur with no separation of time, i.e. acquisition of title and attachment of the lien, a sequence exists which has legal significance. It is the existence of this "sequence", rather than the quantity of time separating the components of that sequence, which is the key factor. A true sequence is operative in Owen and

10. See C. Robert Morris, Bankruptcy Fantasy: The Site of Missing Words and the Order of Illusory Events, Arkansas Law Review, Vol. 45, No. 2, (1992), p. 304, ("...the jurists found that the Statute uses a two-step sequence...Although, this was a temporal sequence, no time interval separated its parts...").

under this analysis, Owen satisfies the "before" element stated in Farrey.[11] As a result, Farrey should not operate to preclude lien avoidance under 11 USC 522(f)(1).

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11. The foregoing concept could be illustrated in a slightly different manner. In Cheves, et al. v First National Bank of Gainesville, above, a debtor, who had suffered a judgment against him, acquired ownership of property and contemporaneously gave a purchase money mortgage to the seller. The court held, in that case, that the purchase money mortgage had acquired some "priority" over the previously existing judgment.

Whether interpreted as a "temporal event" or merely as a "legal priority" otherwise contemporaneous events have been given a legal "order". Where interests are favored in the law, i.e. a purchase money mortgage vs. a judgment lien, courts have had no difficulty in finding this "order" or "priority" where competing events would appear to arise at the same time. See Schilling, et al., v Bank of Sulphur Springs, 147 So 218 (Fla 1933); Associates Discount Corporation v Gomes, 338 So 2d 552 (Fla 3d DCA 1976); Sarmiento v Stockton, Whatley, Davin & Company, 399 So 2d 1057 (Fla 3d DCA 1981).

The concept of "ownership" must prevail over the concept of the "lien" whether analyzed in terms of legal priorities or temporal events because the lien is wholly dependent upon "ownership" for its existence. That is not the case where a mortgage competes with the lien because, in that instance, neither interest is dependent upon the other. For these reasons Owen satisfies the "before" condition stated in Farrey and therefore should not be denied avoidance of the lien.

III

Assuming, without conceding, that the Farrey rule otherwise precludes the Petitioner from obtaining avoidance of the lien, the holding in Farrey should be narrowed, or otherwise qualified, because the holding is broader than was necessary to achieve the result in that case. Although the result in Farrey was reasonable given the circumstances of those parties, its holding should not control the outcome of cases, such as Owen, where the true nature of the lien, and the respective property interests of the parties, are fundamentally different.

Although liens of the type found in both Farrey and Owen fall within the code definition of "judicial lien", see 11 USC 101(36), the lien involved in Farrey was, in truth, of a special character. Although declared by judgment, the lien more closely

resembles a purchase money mortgage because it was created as "security" for the payment of the "purchase price" of a pre-existing ownership interest which was being transferred from one party to the other.[12] Security devices of this nature are not avoidable under §522(f), perhaps in part, because such security oftens protects a prior ownership interest which is being transferred. Ownership interests, such as the one in Farrey, are vastly different, and more worthy of protection, than interests acquired by the random operation of judgment lien statutes such as the one involved in Owen.

It is submitted that Respondent's lien and the manner of its creation, is more

12. This Court observed this feature in Farrey. At 111 S Ct 1827, (A77-8), the opinion states

> "...where the lien is granted to the debtor's former spouse under a divorce decree that extinguishes all previous interests the parties had in the property, and in no event secures more than the value of the non-debtor spouse's former interest..." (emphasis added).

typical of the liens which arise in the ordinary course of debtor/creditor relations. For this reason, it appears far more probable that Congress intended to provide relief from the Owen-type lien, rather than the Farrey-type lien, when it fashioned §522(f).

To permit a rule derived for the protection of ownership interests transferred in divorce cases to be applied to the broader category of general judgment liens would, to some degree, defeat the purpose of §522(f). Further, such a rule would grant a dignity or immunity to non-specific liens of general creditors which such liens never previously achieved.[13] This is

13. Farrey parted with her entire ownership interest in exchange for her lien, whereas Mrs Owen did not. Though Farrey's interest was fundamentally superior to Mrs Owen's, each interest would receive identical immunity from §522(f) under the holding of the Court of Appeals in Owen. 961 F 2d 172 (A 4-6). As a , result, the Farrey rule, as applied by the Court of Appeals, reaches beyond its purpose to the point of restricting operation of §522(f) to a greater extent than the code language suggests. No language in §522 supports denial of lien avoidance in Owen. See In Re Latulippe, 13 BR 528 (Bankr D Vt 1981)(noting that §522 contained no "time of attachment" limitation).

not warranted in Owen because there is nothing in the circumstances of the Owen lien which would entitle it to the "specialized" treatment accorded to the Farrey lien.

There are sufficient material distinctions between the Farrey-type lien and the Owen-type lien which would permit a principled narrowing of the Farrey rule. Farrey should be applied to divorce situations or other similar situations where a lien is created for the protection of an ownership interest. The Farrey rule should not be applied to protect general or random lien acquisitions which are common to the ordinary debtor/creditor relation. The Farrey and Owen liens differ in every material respect and they should receive differing treatment under §522 for that reason.

This Court should focus on the interests protected by those liens rather than the "time of attachment" of those liens.

REASONS FOR GRANTING THE WRIT

This Court previously granted certiorari in both Owen and Farrey because of the significance of the lien avoidance provision of the Code. Farrey produced a limitation on the scope of §522(f). The Court of Appeals, in Owen, on remand, further limited the reach of that section by applying Farrey to a dissimilar set of conditions and equities. The Court of Appeals concluded that the Petitioner was disqualified from lien avoidance because he did not own the property "at some point before" the lien attached to the property. This conclusion can not be sustained.

A literal, if technical, application of the phrase "at some point before" would support, rather than deny, lien avoidance to Petitioner for all of the reasons stated in Part II, above. Petitioner asserts that

such an application of the Farrey rule would avoid further limitation or restriction of §522(f). The appropriate focus should be upon the nature of the interests protected by the lien rather than upon the "time of attachment" of that lien.[14]

The Court of Appeals has, in Owen, taken the Farrey rule, a rule generated under special circumstances, and applied that rule to a case where all material features are distinguishable. This has produced a questionable limitation upon the operation or application of §522(f) and it is a limitation or condition which Congress did not impose by the language of that section.[15]

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14. See United States v Donovan, 429 US 413, 97 S Ct 658, 50 L Ed 2d 652 (1977) wherein this Court deemed it proper to grant certiorari where the proper construction to be placed upon a major federal statute was at issue.

15. See Williams v Lee, 358 US 217, 79 S Ct 269, 3 L Ed 2d 251 (1959) wherein this Court granted certiorari where it perceived that the lower court had rendered a doubtful interpretation on an important question. See Note #13, In Re Latulippe, above.

The issue now presented by this petition was left undecided by this Court in its prior opinion. See 111 S Ct 1838, (A 29) where the following appears

> "Under Florida law, the lien may have attached simultaneously with the acqusition of the property interest. If so, it could be argued that the lien did not fix 'on an interest of the debtor' (citing Farrey)....We express no opinion on these points..." [16]

Thus, this Court left open the very issue about which review is now sought, i.e. the proper application of Farrey to the category of liens typified by Owen. This Court has deemed it appropriate to grant certiorari in order to resolve questions left

16. It is reasonable to argue that this Court did not envision Farrey being applied so as to defeat lien avoidance in Owen. The facts in Owen were fully before the Court and the Court had the benefit of the district court opinion wherein the 'fixing' issue was addressed. See 86 BR 691. Furthermore, nothing would have prevented this Court from rendering a 'dual' holding in Owen. This Court did precisely that in Arizona v Fulminante, ___US___, 111 S Ct 1246, 113 L Ed 2d 302 (1991), wherein there appears a holding in an opinion by Justice White and a distinct holding in an opinion by the Chief Justice.

open by prior Supreme Court decision.[17] For the reasons stated in Parts I and III, above, this Court should examine the application of the Farrey rule to non-Farrey type liens.[18]

For all of the foregoing reasons, a clarification or limitation of Farrey is in order. The material features of the liens involved in Farrey and Owen differ markedly from one another. The manner of the creation of the respective lien, its true nature and the magnitude of the interest the lien secures or protects differ in each case. The two liens, consequently, should not receive the same treatment or protection, insofar as §522(f) is applied.

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17. See United States v Martinez-Fuerta, et al., 429 US 543, 96 S Ct 3074, 49 L Ed 2d 1116 (1976); American Textile Manufacturers Inc., et al., v Donovan, 452 US 490, 101 S Ct 2478, 69 L Ed 2d 185 (1981); Parratt v Taylor, 451 US 527, 101 S Ct 1908, 69 L Ed 2d 420 (1981).

18. As noted in footnote #4, above, this Court did not specifically determine the Farrey lien to be a "judicial lien". Some distinction must be made between the liens involved in these cases insofar as §522 is concerned.

In the absence of clarification or limitation of the rule stated in Farrey, the two categories of liens represented in Farrey and Owen are likely to receive equivalent treatment by the lower courts. The distinction between the two categories of liens is too great to permit such a result to exist or continue. Certiorari is appropriate where there exists a need for clarification of a prior Supreme Court opinion.[19]

Valid and significant reasons for the granting of the writ are present here.

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19. See Securities and Exchange Commission v United Benefit Life Insurance Company, 387 US 202, 87 S Ct 1557, 18 L Ed 2d 673 (1967); McDaniel, et al., v Sanchez, 452 US 130, 101 S Ct 2224, 68 L Ed 2d 624 (1981)(certiorari granted because of importance of question presented and because prior opinion not free from ambiguity); Wilkinson v United States, 365 US 399, 81 S Ct 567, 5 L Ed 2d 633 (1961)(writ granted where it was argued that Court of Appeals had misconceived meaning of prior Supreme Court opinion); Schlude v Commissioner of Internal Revenue, 372 US 128, 83 S Ct 601, 9 L Ed 2d 633 (1963)(certiorari granted a second time to consider whether lower court misapprehended the scope of prior Supreme Court opinion); Arkansas v Sanders, 442 US 753, 99 S Ct 2586, 61 L Ed 2d 235 (1979)(certiorari granted to resolve apparent misunderstanding); United States v Doe, 465 US 605, 104 S Ct 1237, 79 L Ed 2d 552 (1984).

CONCLUSION

Certiorari should be granted and the decision of the United States Court of Appeals for the Eleventh Circuit should be reversed.

In the alternative, the Petitioner requests the Court to grant summary reversal in this cause.

Respectfully submitted

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Sarasota, Florida 34236
(813) 351-2883
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari was furnished by US Mail to David A. Townsend, 200 E. Madison Street, Tampa, Florida 33602 and to John R. Shuman, 2555 Enterprise Rd., Clearwater, Florida 34623, Attorneys for Respondent, this ___ day of October 1992.

ROGER L. FISHELL
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Petitioner

92-671

Supreme Court, U.S.
FILED
OCT 16 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1992

DWIGHT H. OWEN

Petitioner

vs

HELEN OWEN

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

APPENDIX

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1900 Main Street #214
Sarasota, Florida 34236
(813) 351-2883
Attorney for Petitioner

BEST AVAILABLE COPY

APPENDIX

In Re Dwight H. OWEN, Debtor

Dwight H. OWEN, Plaintiff-Appellant

v

Helen OWEN, Defendant-Appellee

No 88-3499

United States Court of Appeals

Eleventh Circuit

May 14, 1992

Appeal from the United States District Court for the Middle District of Florida

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before POWELL,* Associate Justice, (Retired), TJOFLAT, Chief Judge, and RONEY, Senior Circuit Judge

PER CURIAM:

The bankruptcy court and the district

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* Honorable Lewis F. Powell, Jr. Associate Justice of the United States Supreme Court, Retired, sitting by designation.

court concluded that 11 USCA §522(f) of the Bankruptcy Code did not permit a debtor to avoid a judicial lien on Florida homestead property when state law creating the homestead exemption did not make the homestead property exempt from such lien. We affirmed. In Re Owen, 877 F 2d 44 (11th Cir 1989). The Supreme Court granted certiorari, Owen v Owen, 495 US 929, 110 S Ct 2166, 109 L Ed 2d 496 (1990), and reversed and remanded for further consideration, ___ US ___, 111 S Ct 1833, 114 L Ed 2d 350 (1991). After reconsideration on remand, we affirm the judgment of the district court.

In 1975, Helen Owen, the creditor,obtained a judgment against the debtor, Dwight Owen, her former husband, for approximately $160,000. The judgment was recorded in Sarasota County, Florida, in July 1976. The debtor did not at that time own any property in Sarasota County. Under Florida law, the

judgment would attach to after-acquired property. B. A. Lott, Inc. v Padgett, 153 Fla 304, 14 So 2d 667 (1943). In 1984, the debtor purchased a condominium in Sarasota County, which immediately became subject to the creditor's judgment lien upon his acquiring title. Porter-Mallard Co. v Dugger, 117 Fla 137, 157 So 429 (1934).

(1) One year later, Florida amended its homestead law so the debtor's condominium, which previously had not qualified as a homestead, thereafter did. Under the Florida Constitution, homestead property is "exempt from forced sale...and no judgment, decree, or execution (can) be a lien thereon..." Fla Const. Art. 10, §4(a). The homestead property is not exempt from forced sale or lien of judgment on the property prior to the property acquiring homestead status. Bessemer v Gersten, 381 So 2d 1344, 1347 n.1 (Fla 1980); Aetna Ins. Co. v LaGasse, 223 So 2d 727, 728 (Fla 1969)

Pasco v Harley, 73 Fla 819, 824-825, 75 So 30, 32-33 (1917); Volpitta v Fields, 369 So 2d 367, 369 (Fla App 1979). See also Lyon v Arnold, 46 F 2d 451, 452 (5th Cir 1931).

The debtor filed a Chapter 7 bankruptcy petition in 1986, claiming that the condominium, as Florida homestead property, was exempt from administration by the bankruptcy court. The debtor sought avoidance of the creditor's judgment lien under 11 USCA §522(f). The bankruptcy court, district court, and a panel of this Court denied relief.

(2) The Supreme Court reversed and remanded, leaving for our consideration on remand whether there was a fixing of a lien on an interest of the debtor and whether the Florida statute extending the homestead exemption was a taking. 111 S Ct at 1838. We hold that there was no fixing of a lien on an interest of the debtor.

"Some courts have held [Section 522(f)] inapplicable to a lien that was already attached to property when the debtor acquired it, since in such case there never was a 'fixing of a lien' on an the debtor's interest." 111 S Ct at 1838.

(3) Under Florida law, the creditor's recorded judgment became a lien upon the real property thereafter acquired by the judgment debtor at the same time that title was acquired in 1984. B. A. Lott, Inc. v Padgett, 153 Fla 304, 14 So 2d 667 (1943). "A judgment lien is a general lien which attaches to any property currently owned by the judgment debtor. It springs to life the minute the debtor acquires property to which it attaches." Allison on the Ocean, Inc. v Paul's Carpet, 479 So 2d 188, 190-91 (Fla Dist Ct App 1985). The judgment was recorded in 1976. The property was acquired and the lien fixed simultaneously in 1984. Therefore, there was never a

fixing of a lien on an interest of the debtor, as the debtor had no property interest prior to the fixing of the lien. The Supreme Court has held that "unless the debtor had the property interest to which the lien attached at some point before the lien attached to that interest, he or she can not avoid the fixing of the lien under the terms of §522(f)(1)." Farrey v Sanderfoot, ___ US ___, 111 S Ct 1825, 1829, 114 L Ed 2d 337, 344 (1991). See also In Re Esposito, 132 BR 493 (Bankr MD Fla 1991)

Because the lien was in existence prior to the property becoming homestead exempt, to permit the debtor's avoidance of this judicial lien would give the debtor a greater interest in the property than he had prior to the filing of the bankruptcy petition. It is clear that prior to the petition the lien was validly attached to the property. Under Florida law, constitution-

al homestead property is exempt from the claims of creditors not secured by a lien on the property. See Fla. Stat. §222.20; Fla. Const. art. 10, §4. Florida law allows, however, attachment of a judgment lien where the lien came into existence prior to the property attaining homestead exemption status, as in this case. Fla. Const. art. 10, §4. See Bessemer v Gersten, 381 So 2d 1344 (Fla 1980).

Given our holding, the statutory expansion of the homestead exemption, which caused the debtor's property to qualify, does not require a subsidiary analysis as to whether it constituted a taking. Here, the debtor's homestead exemption status, in itself, did not conflict with the creditor's lien. It was only when the debtor attempted to use the exemption as an avoidance of the judicial lien in bankruptcy proceedings that a problem developed.

Thus, the fixing of the lien does not

impair an exemption to which the debtor would have been entitled but for the lien. Florida homestead laws do not endow the property with some overall exempt status. It simply provides it is exempt from foreclosure of certain liens, certain specific taxes, and is subject to certain inheritance provisions. See Fla. Stat. § 196.31; Fla. Const. art. 7, §3. The property was never exempt from foreclosure of this lien. None of the other exemptions provided by Florida homestead law are eliminated by this lien. Thus, there was no exemption to which he would have been entitled but for this lien. Looking to 1986, as it was the date of the filing of the bankruptcy petition, 111 S Ct at 1838 n.6, Florida homestead law did not give any interest in an exemption to this debtor that is encumbered by this judgment lien. See Bessemer, 381 So 2d 1344

After reconsidering the issues re-

manded by the Supreme Court, we determine that the debtor can not avoid the judicial lien on the property. Ae affirm the judgment of the district court for the reasons stated above.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-3499

IN RE: DWIGHT H. OWEN

Debtor

DWIGHT H. OWEN

Plaintiff/Appellant

vs

HELEN OWEN

Defendant/Appellee

APPEAL

From the United states District Court

for the Middle District of Florida

Before POWELL*, Associate Justice (Retired), TJOFLAT, Chief Judge, and RONEY, Senior Circuit Judge.

BY THE COURT:

Appellant's motion for prehearing conference is DENIED AS MOOT.

Appellant's requestfor supplemental briefing is DENIED AS MOOT.

Appellant's request for oral argument is DENIED AS MOOT.

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*Honorable Lewis F. Powell, Jr., Associate Justice of the United States Supreme Court Retired, sitting by designation.

(Filed, U.S. Court of Appeals, Eleventh Circuit, May 14, 1992, Miguel J. Cortez, Clerk)

No 89-1008

IN THE

SUPREME COURT OF THE UNITED STATES

DWIGHT H. OWEN

Petitioner

vs

HELEN OWEN

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Argued November 5, 1990

Decided May 23, 1991

JUSTICE SCALIA delivered the opinion of the Court.

The Bankruptcy Code allows the states to define what property a debtor may exempt from the bankruptcy estate that will be distributed among his creditors. 11 USC §522(b). The Code also provides that

judicial liens encumbering exempt property can be eliminated. 11 USC §522(f). The question in this case is whether that elimination can operate when the State has defined the exempt property in such a way as specifically to exclude property encumbered by judicial liens.

I

In 1975, Helen Owen, the respondent, obtained a judgment against petitioner Dwight Owen, her former husband, for approximately $160,000. The judgment was recorded in Sarasota County, Florida, in July 1976. Petitioner did not at that time own any property in Sarasota County, but under Florida law, the judgment would attach to any after-acquired property recorded in the county. B. A. Lott, Inc. v Padgett, 153 Fla 304, 14 So 2d 667 (1943). In 1984, petitioner purchased a condominium in Sarasota County; upon acquisition of title, the property became subject to respondent's judgment lien. Porter-Mallard Co. v Dug-

ger, 117 Fla 137, 157 So 429 (1934).

One year later, Florida amended its homestead law so that petitioner's condominium, which previously had not qualified as a homestead, thereafter did. Under the Florida Constitution, homestead property is "exempt from forced sale...and no judgment, decree or execution [can] be a lien thereon...," Fla. Const. Art. 10, §4(a). The Florida courts have interpreted this provision, however, as being inapplicable to pre-existing liens, i.e. liens that attached before the property acquired its homestead status. Bessemer v Gersten, 381 So 2d 1344, 1347 n.1 (Fla 1980); Aetna Ins. Co., v LaGasse, 223 So 2d 727, 728 (Fla 1969); Pasco v Harley, 73 Fla 819, 824-825, 75 So 30, 32-33 (1917); Volpitta v Fields, 369 So 2d 367, 369 (Fla App 1979); Lyon v Arnold, 46 F 2d 451, 452 (CA5 1931). Pre-existing liens, then, are in effect an exception to the Florida homestead exemption.

In January 1986, petitioner filed for bankruptcy under chapter 7 of the Code, and claimed a homestead exemption in his Sarasota condominium. The condominium, valued at approximately $135,000, was his primary asset; his liabilities included approximately $350,000 owed to the respondent. The bankruptcy court discharged petitioner's personal liability for these debts, and sustained, over respondent's objections, his claimed exemption.

The condominium, however, remained subject to respondent's pre-existing lien, and after discharge, petitioner moved to reopen his case to avoid the lien pursuant to §522(f)(1). The Bankruptcy Court refused to decree the avoidance; the District Court affirmed, finding that the lien had attached before the property qualified for the exemption, and that Florida law therefore did not exempt the lien encumbered property. 86 BR 691 (MD Fla 1988). The court of

appeals for the Eleventh Circuit affirmed on the same ground. 877 F 2d 44 (1989). We granted certiorari. 495 US ____, 110 S Ct 2166, 109 L Ed 2d 496 (1990).

II

(1) An estate in bankruptcy consists of all the interests in property, legal and equitable, possessed by the debtor at the time of filing, as well as those interests recovered or recoverable through transfer and lien avoidance provisions. An exemption is an interest withdrawn from the estate (and hence from the creditors) for the benefit of the debtor. Section 522 determines what property a debtor may exempt. Under §522(b), he must select between a list of federal exemptions (set forth in §522(d)) and the exemptions provided by his State, "unless the State law that is applicable to the debtor...specifically does not s authorize," 11 USC 522(b)(1)- that is, unless the State "opts out" of the federal

list. If a State opts out, then its debtors are limited to the exemptions provided by state law. Nothing in subsection (b) (or elsewhere in the Code) limits a State's power to restrict the scope of its exemptions; indeed, it could theoretically accord no exemptions at all.

Property that is properly exempted under §522 is (with some exceptions) immunized against liability for prebankruptcy debts. §522(c). No property can be exempted (and thereby immunized), however, unless it first falls <u>within</u> the bankruptcy estate. Section 522(b) provides that the debtor may exempt certain property "from property of the estate"; obviously, then, an interest that is not possessed by the estate can not be exempted. Thus, if a debtor holds only bare legal title to his house-if, for example, the house is subject to a purchase money mortgage for its full value- then only that legal interest passes to the estate;

the equitable interest remains with the mortgage holder, 11 USC 541(d). And since the equitable interest does not pass to the estate, neither can it pass to the debtor as an exempt interest in property. Legal title will pass, and can be the subject of an exemption; but the property will remain subject to the lien interest of the mortgage holder. This was the rule of Long v Bullard, 117 US 617, 6 S Ct 917, 29 L Ed 1104 (1886), codified in §522. Only where the Code empowers the court to avoid liens or transfers can an interest originally not within the estate be passed to the estate, and subsequently (through the claim of an exemption) to the debtor.

It is such an avoidance provision that is at issue here, to which we now turn. Section 522(f) reads as follows:

> "(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in (cont.)

property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is -

"(1) a judicial lien; or

"(2) a nonpossessory, non-purchase money security interest..."

The lien in the present case is a judicial lien, and we assume without deciding that it fixed "on an interest of the debtor in property." See Farrey v Sanderfoot, ___ US ___, 111 S Ct 1825, ___ L Ed 2d ____ (1991). The question presented by this case is whether it "impairs an exemption to which [petitioner] would have been entitled under subsection (b)." Since Florida has chosen to opt out of the listed federal exemptions, see Fla. Stat. §222.20 (1989), the only subsection (b) exemption at issue is the Florida homestead exemption described above. Respondent suggests that, to resolve this case, we need only ask whether the judicial lien impairs that exemption. It obviously does not, since

the Florida homestead exemption is not assertable against pre-exising judicial liens. To permit avoidance of the lien, respondent urges, would not preserve the exemption but would expand it.

(2) At first blush, this seems entirely reasonable. Several Courts of Appeals in addition to the Eleventh Circuit here have reached this result with respect to built-in limitations on state exemptions,[1] though others have rejected it.[2] What must give us pause, however, is that this result has been widely and uniformly rejected with respect to built-in limitations on the federal exemptions. Most of the federally listed exemptions (set forth in §522(d)) are explicitly restricted to the

1. See In Re Pine, 717 F 2d 281 (CA 6 1983); In Re McManus, 681 F 2d 353 (CA 5 1982).

2. See In Re Brown, 734 F 2d 119 (CA 2 1984); Dominion Bank of Cumberlands, NA v Nuckolls, 780 F 2d 408 (CA 4 1985); In Re Thompson, 750 F 2d 628 (CA 8 1984); In Re Leonard, 866 F 2d 335 (CA 10 1989).

"debtor's aggregate interest" or the "debtor's interest" up to a maximum amount. See §§522(d)(1)-(6),(8). If respondent's approach to §522(f) were applied, all of these exemptions (and perhaps others as well)[3] would be limited by unavoided encumbering liens, see "522(c). The federal homestead exemption, for example, allows the debtor to exempt from the property of the estate "the debtor's aggregate interest, not to exceed $7,500 in value, in ... a residence." §522(d)(1). If respondent's interpretation of §522(f) were applied to this exemption, a debtor who owned a house worth $10,000 that was subject to a judicial lien for $9,000 would not be entitled to the full homestead exemption of $7,500.

3. Exemption (7) refers to a life insurance contract "owned" by the debtor, and exemptions (10) and (11) refer to various benefits, awards and payments that the debtor has a "right to receive". §522(d)(7),(10), (11). Only exemption (9). §522(d)(9), contains no language arguably excluding property subject to lien.

The judicial lien would not be avoidable under §522(f), since it does not "impair" the exemption, which is limited to the debtor's "aggregate interest" of $1,000. The uniform practice of the bankruptcy courts, however, is to the contrary. To determine the application of §522(f) they ask not whether the lien impairs an exemption to which the debtor is in fact entitled, but whether it impairs an exemption to which he would have been entitled but for the lien itself.[4]

4. See, e.g. In Re Simonson, 758 F 2d 103, 105 (CA 3 1985); In Re Brantz, 106 BR 62, 68 (Bkrtcy Ct ED Pa 1989); In Re Carney, 47 BR 296, 299 (Bkrtcy Ct Mass 1985); In Re Losieniecki, 17 BR 136, 138 (Bkrtcy Ct WD Pa 1981). See also 3 Collier on Bankruptcy §522.29 (15th Ed 1990); B. Weintraub & A. Resnick, Bankruptcy Law Manual §4.08[2] (1986); Bowmar, Avoidance of Judicial Liens that Impair Exemptions in Bankruptcy: The Workings of 11 USC §522(f)(1), 63 Am Bankr LJ 375, 387-388, and n. 85 (1989)(hereinafter Bowmar). Some courts have held that §522(f) allows the avoidance of liens even when, after the avoidance, there would be no debtor's interest in the property to which a §522(d) exemption could attach. See e.g. In Re Hooper, 60 BR 640 at 641 (Bkrtcy Ct WD Pa 1986); In Re Barone, 31 BR 540 (Bkrtcy Ct ED Pa 1983). Today's opinion does not speak to this issue. Finally, at least one court has suggested that equity excluding the liens is required for there to be an "interest" within the scope of §522(f), In Re Miller, 8 BR 43 (Bkrtcy Ct WD Mo 1980), but that position has been rejected. In Re Cole, 15 BR 322, 323, n. 1 (Bkrtcy Ct WD Mo 1981).

As the preceding italicized words suggest, this reading is more consonant with the text of §522(f) - which establishes as the baseline, against which impairment is to be measured, not an exemption to which the debtor "is entitled", but one to which he "would have been entitled." The latter phrase denotes a state of affairs that is conceived or hypothetical, rather than actual, and requires the reader to disregard some element of reality. "Would have been" but for what? The answer given, with respect to the federal exemptions, has been but for the lien at issue, and that seems to us correct.

The only other conceivable possibilty is but for a waiver - harking back to the beginning phrase of §522(f), "Notwithstanding any waiver of exemptions..." The use of contrary-to-fact construction after a "notwithstanding" phrase is not, however, common usage, if even permissible. Moreover, though one might employ it when the

"notwithstanding" phrase is the main point of the provision in question ("Notwithstanding any waiver, a debtor shall retain those exemptions to which he would have been entitled under subsection (b)"), it would be most strange to employ it where the "notwithstanding" phrase, as here, is an aside. The point of §522(f) is not to exclude waivers (though that is done in passing, waivers are addressed directly in §522(e)) but to provide that a debtor may avoid the fixing of a lien. In that context, for every instance in which "would have been entitled" may be accurate (because the incidentally mentioned waiver occurred) there will be thousands of instances in which "is entitled" should have been used. It seems to us that "would have been entitled" must refer to the generality, if not indeed the universality, of cases covered by the provision; and on that premise the only conceivable fact we are invited to disregard

is the existence of the lien.

This reading must also be accepted, at least with respect to the federal exemptions, if §522(f) is not to become an irrelevancy with respect to the most venerable, most common and most important exemptions. The federal exemptions for homestead (§522(d)(1)), for motor vehicles (§522(d)(2)) for household goods and wearing apparel (§522(d)(3)), and for tools of the trade (§522(d)(6)), are all defined by reference to the debtor's "interest" or "aggregate interest", so that if respondent's interpretation is accepted, no encumbrances of these could be avoided. Surely, §522(f) promises more than that - and surely it would be bizarre for the federal scheme to prevent the avoidance of liens on those items, but to permit it for the less crucial items (for example, an "unmatured life insurance contract owned by the debtor," §522(d)(7)) that are not described in such

fashion as unquestionably to exclude liens.

We have no doubt, then, that the lower courts' unanimously agreed-upon manner of applying §522(f) to federal exemptions - ask first whether avoiding the lien would entitle the debtor to an exemption, and if it would, the avoid and recover the lien - is correct.[5] The question then becomes whether a different interpretation should be adopted for State exemptions. We do not see how that could be possible. Nothing in the text of §522(f) remotely justifies treating the two categories of exemptions differently. The provision refers to the impairment of "exemption(s) to which the debtor would have been entitled under subsection (b)," and that includes federal exemptions and state exemptions alike. Nor is there any overwhelmingly clear policy im-

5. For a more precise formulation, see In Re Brantz, 106 BR at 68; In Re Carney, 47 BR at 299; Bowmar 388-392.

pelling us, if we possessed the power, to create a distinction that the words of the statute do not contain. Respondent asserts that it is inconsistent with the Bankruptcy Code's "opt out" policy, whereby the States may define their own exemptions, to refuse to take those exemptions with all their built-in limitations. That is plainly not true, however, since there is no doubt that a state exemption which purports to be available "unless waived" will be given full effect, even if it has been waived, for purposes of §522(f)- the first phrase of which, as we have noted, recites that it applies "[n]otwithstanding any waiver of exemptions." See Dominion Bank of Cumberlands, NA v Nuckolls, 780 F 2d 408, 412 (CA 4 1985). Just as it is not inconsistent with the policy of permitting state-defined exemptions to have another policy disfavoring waiver of exemptions, whether federal- or state-created;

so also it is not inconsistent to have a policy disfavoring the impingement of certain types of liens upon exemptions, whether federal- or state-created. We have no basis for pronouncing the opt-out policy absolute, but must apply it along with whatever other competing or limiting policies the statute contains.

On the basis of the analysis we have set forth above with respect to federal exemptions, and in light of the equivalency of treatment accorded to federal and state exemptions by §522(f), we conclude that Florida's exclusion of certain liens from the scope of its homestead protection does not achieve a similar exclusion from the Bankruptcy Code's lien avoidance provision.[6]

6. In the dissent's view, the question is whether the lien impairs an "exemption to which the debtor would have been entitled at the time the lien 'fixed'" Post, at 1840. Under the Code, however, the question is whether the lien impairs an "exemption to which the debtor would have been entitled under subsection (b)," and under subsection (b), exempt property is determine "on the date of the filing of the petition," not when the lien fixed. 11 USC §522(f), (b)(2)(A). We follow the language of the Code.

III

The foregoing conclusion does not necessarily resolve this case. Section 522(f) permits the avoidance of the "fixing of a lien on an interest of the debtor". Some courts have held it inapplicable to a lien that was already attached to property when the debtor acquired it, since in such a case there never was a "fixing of a lien" on the debtor's interest. See In Re McCormick, 18 BR 911, 914 (Bkrtcy Ct WD Pa),aff'd 22 BR 997 (WD Pa 1982); In Re Scott, 12 BR 613, 615 (Bkrtcy Ct WD Okla 1981). Under Florida law, the lien may have attached simultaneously with the acquisition of the property interest. If so, it could be argued that the lien did not fix "on an interest of the debtor." See Farrey v Sanderfoot, ___US____, 111 S Ct 1825, ___L Ed 2d ___ (1991). The court of Appeals did not pass on this issue, nor on the subsidiary

question of whether the Florida statute extending the homestead exemption was a taking, cf United States v Security Industrial Bank, 459 US 70, 103 S Ct 407, 74 L Ed 2d 235 (1982). We express no opinion on these points, and leave them to be considered by the Court of Appeals on remand.

The judgment of the Court of Appeals is reversed, and the case remanded for proceedings consistent with this opinion.

It is so ordered.

Justice STEVENS dissenting.

The Court's analysis puts the cart before the horse. As I read the statute at issue, it is not necessary to reach the issue the majority addresses. In construing the lien avoidance provisions of the Bankruptcy Code, it is important to recog-

nize á distinction between two classes of cases: those in which the lien attached to the exempt property before the debtor had any right to claim an exemption, and those in which the lien attached after the debtor acquired that right. This case falls in the former category. As I shall explain, I believe it was correctly decided by the Bankruptcy Court, the District Court and the Court of Appeals, and that the judgment should be affirmed.

I

The facts raise a straight forward issue: whether the lien avoidance provisions in §522(f) of the Bankruptcy Code, 11 USC 522(f)[1] apply to a judicial lien

1. Section 522(f) provides:
"(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entiltled under subsection (b) of this section, if such lien is -
(1) a judicial lien; or
(2) a nonpossessory, nonpurchase-money security interest..."

that attached before the debtor had any claim to an exemption. It is undisputed that respondent's judicial lien attached to petitioner's Sarasota condominium when he acquired title to the property in November 1984. It is also undisputed that the petitioner was not entitled to a homestead exemption when he acquired title because he was single. At that time, the exemption was available only to a "head of a household" under Article 10, §4 of the Florida Constitution. An amendment that became effective in 1985 broadened the exemption to extend to "a natural person." Fla. Const. Art 10, §4. On the effective date of this amendment petitioner became entitled to the homestead exemption at issue in this case.[2] Thus, it is undisputed that the petitioner had an exemption on his condominium when he filed his bankruptcy petition in 1986, but did not have a right to that exemption

2. The amendment was adopted in November 1984, but became effective on January 8, 1985. See Fla. Const., Art. 11, § 5.

in 1984 when respondent's lien attached.

As I read the text of §522(f), it does not authorize the avoidance of liens that were perfected at a time when the debtor could not claim an exemption in the secured property. The Bankruptcy Code deals with the subject of exemptions in two separate provisions that are relevant to this case. The first of these provisions, §522(b), identifies property that is exempt from the claims of general creditors.[3] Focusing on

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3. Section 522(b) provides, in relevant part:

"Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection.

. . . . .

"Such property is-

"(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative.

"(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place;..."

the legal interests in the property at the time of the bankruptcy, this section identifies property that is exempt from the bankruptcy estate, and therefore can not be sold by the trustee to satisfy claims of general creditors. See H.R. Rep. No. 95-595, pp. 360-361 (1977); S.Rep. No. 95-989, pp.75-76 (1978), U.S. Code Cong. & Admin. News 1978. p. 5787. In this case, petitioner's condominium in Sarasota, Florida was entitled to a homestead exemption as a matter of Florida law when he filed for bankruptcy and therefore was properly excluded from the estate. See 877 F 2d 44, 45 (CA 11 1989). The property was fully protected from the claims of general creditors by the operation of §522(b).

The second provision that is relevant to this suit, §522(f), is concerned with the priority of secured creditors not the claims of general creditors. Section 522(f) establishes a rule of priority between the

debtor's legal interest and creditor's security interests in exempt property as opposed to the property of the estate. The statute establishes the priority by allowing the debtor to avoid the fixing of judicial liens and certain nonpossessory, nonpurchase money security interests under the right circumstances to the extent that they encumber the exemption.

As it applies to judicial liens, §522(f) raises two questions: (1) whether the exemption provides a basis for avoidance of the lien; and (2) if so, to what extent should the lien be avoided? The first question concerns the relative priority of conflicting claims on the same asset; on such issues, the timing of the claims is often decisive. The second question - I shall call it the "impairment question" - concerns the distribution of the proceeds of sale after the issue of priority has been resolved.

This second question need not be reached unless the first question has been answered positively.

In determining whether the exemption provides a basis for avoiding the lien, §522(f) turns our attention towards the exemption to which the debtor would have been entitled at the time the lien "fixed". In United States v Security Industrial Bank, 459 US 70, 103 S Ct 407, 74 L Ed 2d 235 (1982), this Court was presented with the question whether applying §522(f)(2) to avoid nonpossessory liens perfected before the enactment of the Bankruptcy Reform Act of 1978 would be a taking of property without compensation in violation of the Fifth Amendment of the Constitution. The Court avoided deciding that precise question by holding that §522(f) did not apply retroactively to liens that had been perfected before the Bankruptcy Reform Act had been enacted. Although there is no such cons-

titutional question presented here, Security Industrial Bank, establishes that the critical date for determining whether a lien may be avoided under the statute is the date of the fixing of that lien.

The date of the fixing of the respondent's lien on petitioner's condominium is therefore controlling in this case. Because it is undisputed that petitioner was not entitled to an exemption when the lien attached, the subsequently acquired exemption does not provide a basis for avoidance of the respondent's lien.[4] Thus, the prior-

4. I recognize that in reading the text of §522(f), it is possible to find ambiguity in the timing issue from the placement of the phrase "under subsection (b) of this section." As I understand the the interaction between §522(b) and §522(f), however, those words merely define the exempt property for the purposes of determining the priorities between the debtor and secured creditor- namely the kinds of exemptions that may justify an avoidance. The fact that §522(b) itself refers to the status of the lien at the time of bankruptcy for the purpose of identifying the property as exempt from the claims of general creditors is simply irrelevant to the priority question posed under §522(f). The Court's statement, ante, at ___ _ ____, n. 6, that "[w]e follow the language of the Code" ignores this point, ignores our holding in United States v Security Industrial Bank, 459 US 70, 103 S Ct 407, 74 L Ed 2d

ity question in this case was correctly decided by the Court of Appeals and its judgment should be affirmed.

II

The court frames the question it decides as whether the lien avoidance provisions in §522(f) "can operate when the State has defined the exempt property in such a way as specifically to exclude property encumbered by judicial liens." Ante, at 1834. This is an accurate description of the issue that has arisen in cases concerning the avoidability of nonpossessory, nonpurchase-money liens on household goods. See cases cited, ante, at 1836, nn. 1 1nd 2.[5]

4. (cont.) 235 (1982), and ignores our holding in Farrey v Sanderfoot, ___ US ____, 111 S Ct 1825, ___ L Ed 2d ____(1991).

5. Two of these cases, however, do address different issues. In Re Brown, 734 F 2d 119 (CA 2 1984) involved a judicial lien. In that case the issue was whether the debtor could avoid a judicial lien on his homestead after a foreclosure sale where New York law did not allow an exemption on the proceeds of a foreclosure sale. In Re Thompson, 750 F 2d 628 (CA 8 1984 was concerned with the issue of whether a debtor could avoid a lien on a Nebraska exemption on livestock under §522(f)(2).

In each of those cases the state's definition of the exemption purported to exclude property interests that were subject to otherwise avoidable liens under §522(f). Thus, the state's definition of the exemption itself defeated the purpose of the federal lien avoidance provisions by narrowing the category of exempt property.[6]

The majority and dissenting opinions in In re McManus, 681 F 2d 353 (CA 5 1982), adequately identify the issue to which the Court's opinion today is addressed. In that case a finance company (AVCO) held a nonpossessory, nonpurchase-mony security interest in the form of a chattel mortgage on some of the debtor's household goods and furnishings. The debtors sought to

6. In this case, in contrast, Florida's definition of its household exemption excluded petitioner's property because it was not used as a family residence at the time his former spouse's lien attached. The subsequent broadening of Florida's homestead exemption was not even arguably intended to protect the interest of lien holders or to defeat the purposes of the federal lien avoidance provisions.

avoid AVCO's lien under §522(f) on the ground that their household goods and furniture were exempted under §522(b). The Bankruptcy Court and the District Court refused to avoid the lien. The Court of Appeals, following the reasoning of the Bankruptcy Court, affirmed.[7] Louisiana had established a homestead exemption for certain houshold goods and furniture. Yet, it had also explicitly established in a separate code provision that notwithstanding its definitions of homestead exemptions, any household goods or furniture encumbered by a mortgage are not exempt property. The majority of the Court of Appeals held that the liens were not avoidable because the State of Louisiana had

7. Another case with similar facts, Blazer Financial Services v Gipson was consolidated with In Re McManus before the Court of Appeals. In Re McManus 681 F 2d 353 (CA 5 1982). The debtors were a married couple who had filed a petition in bankruptcy and sought to avoid a finance company's nonpossessory, nonpurchasemoney security interest in their household goods. See id., at 355.

utilized its authority under §522(b) to define its exemptions to exclude household goods subject to mortgages; hence the liens did not impair an exemption to which the debtors would have been entitled under §522(b).

Under my reading of §522(f), the Court of Appeals erred because it focused its attention entirely on the situation at the time of the bankruptcy. If it had analyzed the case by noting that at the time AVCO's lien attached, the debtors were already entitled to an exemption, it should have concluded that the lien was avoidable. The dissenting judge came to that conclusion by correctly recognizing that the statutory text evidences an intent to consider the situation at the time of attachment. He wrote:

> "The opening phrase of §522(f), '[n]otwithstanding any waiver of exemptions,' indicates that the subsection's import is to return the situation to the status quo

> ante, i.e. prior to any improvident waiver of any exemption by the debtor. When the debtors entered the creditor's office they enjoyed an exemption under Louisiana law from seizure and sale of their household goods; and when they left the office they could no longer claim an exemption for those goods solely because they had improvidently granted a security interest to the creditors covering such goods. I fail to see how this could be characterized as anything but a waiver of exemptions, subject to the avoiding power found in §522(f)." Id., at 358.[8]

Although the Court's opinion today resolves the question that was presented in McManus by adopting the position of the dissent in McManus, I disagree with the Court's

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8. Judge Dyer buttressed his conclusion by reference to the legislative history:
"This is clearly indicated in S.Rep. No. 95-989, 95th Cong., 2nd Sess. 76, U.S.Code Cong. & Admin. News 1978 pp. 5787, 5862:
"'[To] protect the debtors' exemptions, his discharge, and thus his fresh start,...[t]he debtor may avoid... to the extent that the property could have been exempted in the absence of the lien...a nonpossessory, nonpruchase-money security interest in certain household and personal goods.'
'Thus itwas Congress's clear intent that a debtor benefit to the fullest extent possible exemptions granted to him by applicable state laws, even when he may have improvidently waived such exemptions. It is equally clear that Congress was particularly concerned with eradicating certain unconscionable creditor practices in the consumer loan industry." In Re McManus, 681 F 2d at 358.

reasoning. The Court simply overlooks the fact that for purposes of determining whether a lien is avoidable - rather than for the purpose of determining the extent to which the lien should be avoided - the question whether the debtor "would have been entitled" to an exemption is addressed to the state of affairs that existed at the time the lien attached.

Finally, I must comment on the Court's conclusion "that Florida's exclusion of certain liens from the scope of its homestead protection does not achieve a similar exclusion from the Bankruptcy Code's lien avoidance provision." Ante, at 1838. This statement treats Florida's refusal to apply its broadened homestead exemption retroactively as the equivalent of Louisiana's narrowing definition of its homestead goods exemption to exclude properties subject to a chattel mortgage. The conclusion is flawed. Petitioner would not have

been entitled to a homestead exemption at the time respondent's judicial lien attached; for that reason the lien avoidance provisions in §522(f) of the Bankruptcy Code are not applicable. I would therefore affirm the judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-3499

D.C. Docket No. 88-00404

IN RE: DWIGHT H. OWEN

Debtor

DWIGHT H. OWEN

Plaintiff-Appellant

v.

HELEN M. OWEN

Defendant-Appellee

APPEAL

From the United States District Court

for the Middle District of Florida

Before POWELL*, Associate Justice (Retired), United States Supreme Court, RONEY, Chief Judge, and TJOFLAT, Circuit Judge.

JUDGMENT

This cause came on to be heard on the

transcript of the record from the United States District Court for the Middle Distri of Florida, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED:

IT IS FURTHER ORDERED that plaintiff-appellant pay to the defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

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*Honorable Lewis F. Powell, Jr., Associate Justice of the United States Supreme Court, retired, sitting by designation.

Entered: July 11, 1989

For the Court: Miguel J. Corte
Clerk

By:/s/ David Maland
Deputy Clerk

ISSUED AS MANDATE: September 8, 1989

BEST AVAILABLE COPY

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No, 88-3499

IN RE: DWIGHT H. OWEN

Debtor

DWIGHT H. OWEN

Plaintiff-Appellant

v.

HELEN OWEN

Defendant-Appellee

Appeal

From the United States District Court

for the Middle District of Florida

ON PETITIONS FOR REHEARING

AND SUGGESTIONS FOR REHEARING IN BANC

(Opinion July 11, 1989, 11 Cir., 1989,

_____ F. 2d _____).

(August 31, 1989)

Before POWELL*, Associate Justice (Retired),

United States Supreme Court, RONEY, Chief

Judge, and TJOFLAT, Circuit Judge.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor other judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions for Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Paul H. Roney

United States Circuit Judge

*Honorable Lewis F. Powell, Jr., Associate Justice of the United States Supreme Court, Retired, sitting by designation.

In Re Dwight H. OWEN, Debtor

Dwight H. OWEN, Plaintiff-Appellant

v

Helen OWEN, Defendant-Appellee

No 88-3499

United States Court of Appeals

Eleventh Circuit

July 11, 1989

Appeal from the United States District Court for the Middle District of Florida

Before POWELL*, Associate Justice (Retired), United States Supreme Court, RONEY, Chief Judge, and TJOFLAT, Circuit Judge.

RONEY, Chief Judge:

In this case, both the bankruptcy court

*Honorable Lewis F. Powell, Jr., Associate Justice of the United States Supreme Court, Retired, sitting by designation.

and the district court concluded that 11 U.S.C.A. § 522(f) of the Bankruptcy Code did not permit a debtor to avoid a judicial lien on Florida homestead property when state law creating the homestead exemption would permit the lien to be enforced. We affirm.

The facts are not in dispute. The dates are important to show that the lien was effective prior to the date the debtor obtained homestead status for the property. Creditor Helen Owen obtained a final judgment against the debtor Dwight Owen in Manatee County Circuit Court on December 1, 1975, and a certified copy was recorded in the Sarasota County Public Records on July 29, 1976. Such a recorded judgment becomes a lien upon real property thereafter acquired by the judgment debtor, unless the property was exempt from all judgment liens. B.A. Lott, Inc. v. Padgett, 153 Fla. 304, 14 So. 2d 667 (1943); Porter-

Mallard Co. v. Dugger, 117 Fla. 137, 157 So. 429 (Fla. 1934).

In November 1984, the debtor bought a condominium unit in Sarasota County. At the time of the purchase, the debtor was not entitled to a homestead exemption from judgment liens under Article 10, Section 4 of Florida's constitution, because the section then allowed the exemption only to the "head of a family". An amendment to this section, allowing the exemption for "a natural person" did not become effective until January 8, 1985. Thus, at the time of the purchase, the judgment lien attached to the property.

The debtor filed a Chapter 7 bankruptcy petition in January 1986 and claimed the condominium as Florida homestead property, exempt from administration by the bankruptcy court. Under Florida law, constitutional homestead property is exempt from the claims of creditors not secured by a lien on the

property. See Fla. Stat. §222.20; Fla. Const. Art 10, §4. The bankruptcy court, in an August 13, 1986 order, allowed the property to be exempt from general administration by the trustee, but specifically did not decide whether Helen Owen's judgment lien against the property would be enforceable.

The debtor was discharged on May 13, 1986. In April 1987, however, the debtor was given permission to reopen the bankruptcy case pursuant to 11 U.S.C.A. § 350. He then moved, according to Rule 4003(d), to seek an avoidance of Helen Owen's judgment lien, under 11 U.S.C.A. § 522(f)[1].

After hearing argument, the bankruptcy court on December 1, 1987, granted the

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1. Section 522(f) provides in relevant part: Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is --
(1) a judicial lien...

debtor's motion to avoid the lien. Thereafter, however, Helen Owen filed a timely motion to amend or make additional findings of fact and to alter or amend this order. On February 8, 1987, the bankruptcy court reversed its December 1 ruling, finding for the judgment lienholder, stating;

> Clearly, if at the time the certified copy of the judgment was recorded in the Public Records, the Debtor owned the property but for whatever reason did not qualify to claim the property as homestead, such judgment lien would be clearly non-avoidable under 522(f) of the Bankruptcy Code. As the judgment lien in this case attached before the property qualified as homestead, the judgment lien is not of the type included within the ambit of 522(f)(1) and may not be avoided.

The district court upheld the bankruptcy court's determination that Helen Owen's lien, which substantially predated the acquisition of the property and the filing of the bankruptcy petition, was not avoidable under section 522(f). 86 B.R. 691 (M.D. Fla. 1988).

When a bankruptcy petition is filed, all of the debtor's property becomes the property of the bankruptcy estate. 11 U.S.C.A. § 541(a). After the property comes into the estate, the debtor may claim certain items as exempt from the bankruptcy estate[2]. The federal statute provides a "laundry list" of property available for exemption, unless a state "opts out" of this list and allows its residents to take advantage only of the state-created exemptions.

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2. 11 U.S.C.A. §522(b) provides in relevant part: Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate either--

(1) property that is specified under subsection (d) of this section, [the federal list], unless the state law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place...

Florida has chosen to opt out of the bulk of the federal laundry list[3]. Accordingly, Florida state law governs the question of whether property may be exempted from the bankruptcy estate.

The claimed exemption here is created by Florida's constitutional homestead provision. Article 10, § 4 of the Florida Constitution states in part that homestead property is not subject to foreclosure of a judgment lien[4].

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3. See Fla. Stat. § 222.20 (opt out); section 220.201 (allowing exemption described in subsection (d)(10) relating to debtor's rights to receive benefits such as social security and unemployment compensation). Section 222.20 further provides that "[n]othing herein shall affect the exemptions given to residents of this state by the State Constitution and the Florida Statutes."

4. (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field, or other labor performed on the realty, the following property owned by a natural person:
(1) a homestead,...if located within a municipality, to the extent of one-half acre (cont,)

Section 522(f) allows the debtor to avoid certain liens in order to protect against impairment of an exemption to which he would otherwise be entitled. There is no impairment of an exemption here, however. Under state law, the homestead exemption precludes attachment of a judgment lien except where the lien came into existence prior to the property attaining homestead status. Fla. Const. Art. 10, §4; see Bessemer v. Gersten, 381 So. 2d 1344 (Fla. 1980); Aetna Ins. Co. v. LaGasse, 223 So. 2d 727 (Fla. 1969); Volpitta v. Fields, 369 So. 2d 367 (Fla. 4th DCA), cert denied, 379 So. 2d 204 (Fla. 1979); In Re Valdes, 81 B.R. 141 (Bankr. S.D. Fla. 1987). Where, as here, the judgment attached prior to

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4. (cont.) of contiguous land, upon which the exemption shall be limited to the residence of the owner or his family.

the homestead right, there is no impairment because the exemption is specifically subject to this exception.

The debtor here does not dispute that Helen Owen's lien on his property would be enforceable under Florida law because it attached to the property before the debtor was able to avail himself of the homestead right. He argues, though, that section 522 (f) allows him to avoid the lien because he now qualifies for the homestead exemption and if the lien did not exist, he could claim the exemption. In effect, he argues that federal law gives him an exemption that state law would not, even though the exemptions in Florida are defined by state law because of its "opting out" of the federal exemptions.

Congress did not intend through section 522(f), however, to provide a federal exemption greater than that protected by state law where the exemption is created by state

law. The legislative history of section 522(f) indicates that Congress sought to protect debtors from the race to judgment often occurring just prior to a debtor filing bankruptcy. That is, when it appears that a debtor is having trouble meeting his obligations, creditors rush to reduce their interests to judgment, attaching all of the debtor's property, including that which would otherwise be exempt. Thus, when the debtor files, he has no unencumbered property left with which to "make his fresh start." Accordingly, section 522(f) was adopted to

> ...give[] the debtor certain rights not available under current law with respect to exempt property. The debtor may avoid any judicial lien on exempt property, and any non-purchase money security interest in certain exempt property such as household goods. The first right allows the

> debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists to provide relief for an overburdened debtor. If a creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions....

H.R.Rep.No. 595, 95th Cong., 1st Sess., reprinted in U.S.Code Cong. & Ad. News 5787, 6087 (1978). This is not the case here. The debtor never held this property exempt from this judicial lien.

We also hold that the bankruptcy judge acted within his authority under the local rules to issue the February order without affording a hearing to the debtor. Rule 101(c) of the local bankruptcy rules allows the judge to suspend the reguirements of the rules in order for the case to proceed at the court's direction. Further, the court had before it the entire

record and, under the rules, need only afford notice and a hearing as is "appropriate in the particular circumstances." Here, it was appropriate to rule based on the papers filed by the parties.

For the foregoing reasons, the decision of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

DWIGHT H. OWEN

v Case No. 88-404-CIV-T

-17B

HELEN OWEN

JUDGMENT IN A CIVIL CASE

(X) Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the Bankruptcy Court's Decision is AFFIRMED.

Donald M. Cinnamond
Clerk

Date: June 7, 1988

/s/ Rita J. Cole
Deputy Clerk

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

IN RE:

DWIGHT H. OWEN

Debtor

_____/

DWIGHT H. OWEN

Appellant

vs Appellate Case No.

HELEN OWEN 88-404-CIV-T-17

Appellee

_____/

APPEAL

FROM THE UNITED STATES BANKRUPTCY COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

ORDER ON APPEAL

This cause is before the Court on appeal from the Order on Motion to Amend or Make Additional Findings entered February 8, 1988, by Bankruptcy Judge Alex-

ander L. Paskay, and request for oral argument. The request for oral argument is denied.

ISSUES:

I. Whether or not the trial court correctly ruled that a debtor could not invalidate a judicial lien, pursuant to s522(f)(1) of the Bankruptcy Code, which preceded debtor's homestead exemption under Florida law and arose prior to debtor's acquisition of the subject property.

II. Whether or not the trial court correctly entered an order on motion to amend or make additional findings of fact pursuant to bankruptcy rule 7052(b) and to alter or amend the order on motion to avoid judgment lien pursuant to bankruptcy rule 9023, without notice and a hearing.

STANDARD OF APPELLATE REVIEW

The applicable standard of appellate review is that findings of fact shall not be set aside unless clearly erroneous.

Griffin v Missouri Pacific Railway Co., 413 F.2d 9 (5th Cir.1969); Bankruptcy Rule 8013. Appellant is entitled to an independent de novo review of all conclusions of law and the legal significance accorded to the facts.

FACTS

Helen Owen obtained a final money judgment against the debtor on December 1, 1975, in Manatee County Circuit Court. The certified judgment was recorded in Sarasota County, Florida, on July 29, 1976, O. R. 1127, Page 1494. At that time Appellant did not own property in Sarasota County. On November 27, 1984, debtor acquired a fee simple ownership of the real property known as Unit No. 304, Embassy House. The deed for the property was recorded in the public records of Sarasota County, on November 27, 1984, O. R. 1732, Page 676.

At that time the debtor was a single

man and not the "head of a family", within the meaning of Article 10, Section 4, Florida Constitution, relating to the homestead exemption. On November 6, 1984, the homestead provision was amended substituting "a natural person" for "a head of a family". The amendment became effective January 8, 1985.

Appellant, a single man, filed a Chapter 7 bankruptcy petition on or about January 13, 1986. The petitioner claimed real property known as Unit 304, Embassy House, located in Sarasota County, Florida, as exempt property in the B-4 of the Florida Constitution and Chapter 222.20, Florida Statutes, exempting homestead property.

A creditor, Helen Owen, filed an objection to the exemption claim on January 22, 1986. On August 13, 1986, the bankruptcy judge overruled the objection and designated the property exempt and immune

from the general administration of the Trustee. The debtor did not resolve the issues of post-petition lien status or debtor's rights as to avoidability or enforceability of Helen Owen's lien.

Appellant was granted discharge on May 13, 1986. On December 15, 1986, the debtor filed an application to re-open the case for the purpose of seeking to avoid the lien of Helen Owen, pursuant to 11 USC 522(f)(1). The case was reopened by the bankruptcy court. On April 13, 1987, the debtor filed a motion to avoid the lien and Helen Owen filed a response. Argument was had before the court on August 21, 1987.

On December 1, 1987, the bankruptcy court entered an order granting the motion to avoid the lien. Thereafter, Helen Owen filed a motion to amend or make additional findings of fact, pursuant to Rule 7052(b), and to alter or amend the order of Decem-

ber 1, 1987. On February 8, 1988, the court entered an order reversing the December 1 ruling. The order found the lien sought to be avoided was not of the type included in Section 522(f)(1) and denied debtor's motion to avoid the lien. This is the order appealed from by Appellant.

DISCUSSION

The Court will address the procedural validity of the bankruptcy court's entry of order on motion to amend, filed February 8, 1988. The order states that the cause was before the court on ex parte consideration of Helen Owen's motion to amend. The court considered the motion to amend and the prior record in the cause. The court did not require or allow a response from debtor to the motion to amend, nor was argument or hearing allowed on the motion.

Upon due consideration, the Court finds the brief of Appellee on this issue

persuasive. The local rules of the bankruptcy court imbues the bankruptcy judge with the power to suspend the requirements of the rules and for proceedings in accordance with the court's direction. Rule 101, Local Rules of the Bankruptcy Court. The Court specifically finds the order of February 8, 1988, to have been entered within the authority of Judge Paskay.

The second issue is whether or not the bankruptcy court was in error in amending its previous order and finding that the lien of Helen Owen on the property in question was not avoidable. Appellant seeks to avoid the lien of Helen Owen under 11 USC s522(f), which states in relevant part:

> Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is -- (1) a judicial lien;

The judgment of Helen Owen, recorded in the public records on July 29, 1976, attached as a lien, instantly, upon the acquisition of title by the debtor on 27 November 1984. (Appellant brief, pg. 10). A previously attached judgment lien will prevail over an after acquired right of homestead. Pasco v Harley, 75 So. 30 (Fla. 1917); Aetna Insurance Co. v LaGrasse, 223 So. 2d 727 (Fla. 1967); Bessemer v Gersten, 381 So. 2d 1344 (Fla. 1980). Debtor was not entitled to the homestead exemption on the purchase of the real property; the amendment allowing the exemption did not become effective until January 8, 1985. Under state law, the lien would remain enforceable against this homestead property. (Appellant's brief, pg. 11).

The bankruptcy discharge has no effect on the lien. A judgment attaching to property and becoming a lien prior to bankruptcy survives the discharge and remains

enforceable, to the extent of the state law. Barnett Bank v Harris, 421 So. 2d 822 (Fla. 1st DCA 1982); Albritton v General Portland Cement, 344 So. 2d 574 (Fla. 1977). Appellant contends however that 11 USC s522(f), if affirmative action is taken by a debtor to invoke the provisions of that section, renders the lien herein unenforceable.

Section 522(f) provides for the avoidance of security interests on certain exempt items, to the extent the lien impairs an exemption to which the debtor is entitled. Even though Florida has "opted out" of the exemptions provided in 11 USC s522(d), the provisions of s522(f) are applicable to Florida bankruptcy proceedings. In Re Hershey, 50 B.R. 329 (DC SD Fla. 1985). The question before the court is whether the application of s522(f) allows the debtor to avoid the lien of Helen Owen.

Appellee urges the Court to adopt a position that the lien which substantially

pre-dated both the filing of the bankruptcy petition and the debtor's obtaining of homestead rights is not an avoidable lien within the meaning of s522(f). Appellee cites a line of cases for the proposition that "... a judicial lien which attached to an interest in property prior to the debtor's acquisition of that interest is not avoidable pursuant to s522(f)(1)" inasmuch as "the phrase 'an interest of the debtor in property' refers to an unencumbered interest at the time of acquisition." McCormick v Mid-State Bank and Trust Co. 33 B.R. 997 (WD Pa. 1982); In Re: Williams, 38 B.R. 224 (ND Okla. 1984); In Re: Sprick, 78 B.R. 292 (D Kan. 1987).

The Court finds this line of cases persuasive and adopts their reasoning. The Court additionally finds persuasive the arguments of Appellee that debtor never owned an unencumbered interest in the real property in question, since the lien attached

to the property simultaneously with acquisition of the property.

This Court, having carefully considered the two issues on appeal, concludes that the bankruptcy court did not err in determining that the judgment lien of Helen Owen was not avoidable pursuant to 11 USC s522(f) or erroneously deny debtor a hearing on the motion to amend. Accordingly, it is

ORDERED that the order on motion to amend or make additional findings and to alter or amend order on motion to avoid judgment lien, filed February 8, 1988, be affirmed. The Clerk of the Court is directed to enter judgment in accordance with this Order.

DONE AND ORDERED in Chambers, in Tampa, Florida, this 7th day of June, 1988.

/s/Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties
and counsel
of record

UNITED STATES BANKRUPTCY COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

In Re:

DWIGHT H. OWEN

Debtor Case No 86-106-8P7

ORDER ON MOTION TO AMEND OR MAKE ADDITIONAL FINDINGS OF FACT PURSUANT TO RULE 7052(b) AND TO ALTER OR AMEND THE ORDER ON MOTION TO AVOID JDUGMENT LIEN PURSUANT TO RULE 9023

THIS cause came on for consideration ex parte, upon a Motion to Amend or Make Additional Findings of Fact Pursuant to Rule 7052(b) and to Alter or Amend the Order on Motion to Avoid Judgment Lien Pursuant to Rule 9023 filed by Helen Owen, a creditor in the above captioned Chapter 7 case. The Court has considered the mo-

tion, together with the record, and is satisfied that the Motion is well taken and should be granted. Accordingly, the Order on Motion to Avoid Judgment Lien entered by this Court on December 1, 1987 should be amended as follows:

The Motion to Avoid Judgment Lien was filed by Dwight H. Owen, the Debtor in this Chapter 7 case. The Motion seeks to avoid a judgment lien in favor of Helen Owen. The judgment was obtained on December 1, 1975 and a certified copy was recorded in the Sarasota County Public Records on July 29, 1976.

In November 1984, the Debtor purchased certain real property in Sarasota County, and at this time the judgment of Helen Owen attached to the property.

At the time the Debtor acquired the property and the judgment lien attached, the Debtor was not entitled to claim the property as homestead due to the fact that

he was not a "head of household" as was required under Article X, Section 4 of the Florida Constitution prior to its Amendment. It was not until January 1985, which was the effective date of the Amendment to Article X, Section 4 of the Florida Constitution, which substituted the term "natural person" for the previous term "head of household", that the Debtor was entitled to claim the property as homestead.

Clearly, if at the time the certified copy of the Judgment was recorded in the Public Records, the Debtor owned the property but for whatever reason did not qualify to claim the property as homestead, such judgment lien would be clearly non-avoidable under §522(f)(1) of the Bankruptcy Code. As the judgment lien in this case attached before the property qualified as homestead, the judgment lien is not of the type included within the ambit of §522(f)(1) and may not be avoided.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that the Motion to Amend or Make Additional Findings of Fact Pursuant to Rule 7052(b) and to Alter or Amend the Order on Motion to Avoid Judgment Lien Pursuant to Rule 9023 be, and the same is hereby, granted. It is further

ORDERED, ADJUDGED AND DECREED that the Order on Motion to Avoid Judgment Lien entered on December 1, 1987 be, and the same is hereby, amended to reflect the changes as set forth in this Order. It is further

ORDERED, ADJUDGED AND DECREED that the Debtor's Motion to Avoid Judgment Lien be, and the same is hereby, denied.

DONE AND ORDERED at Tampa, Florida on February 8, 1988.

/s/Alexander L. Paskay
ALEXANDER L. PASKAY
Chief Bankruptcy Judge

cc:
John R. Shuman for lienholder
Roger L. Fishell, Attorney for Debtor
Dwight H. Owen, Debtor

No 90-350

IN THE

SUPREME COURT OF THE UNITED STATES

JEANNE FARREY,
f/k/a Jeanne Sanderfoot

Petitioner

vs

GERALD J. SANDERFOOT

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Argued March 23, 1991

Decided May 23, 1991

JUSTICE WHITE delivered the opinion of the Court.

In this case we consider whether §522(f) of the Bankruptcy Code allows a debtor to avoid the fixing of a lien on a homestead, where the lien is granted to the

debtor's former spouse under a divorce decree that extinguishes all previous interests the parties had in the property, and in no event secures more than the value of the non-debtor spouse's former interest. We hold that it does not.

I

Petitioner Jeanne Farrey and respondent Gerald Sanderfoot were married on August 12, 1966. The couple eventually built a home on 27 acres of land in Hortonville, Wisconsin, where they raised their three children. On September 12, 1986, the Wisconsin Court for Outagamie County entered a bench decision granting a judgment of divorce and property division that resolved all contested issues and terminated the marriage. See Wis. Stat. §767.-37(3)(1989-1990). A written decree followed on February 5, 1987.

The decision awarded each party one-

half of their $60,600.68 marital estate. This division reflected Wisconsin's statutory presumption that the marital estate "be divided equally between the parties." §767.255. The decree granted Sanderfoot sole title to all the real estate and the family house, which was subject to a mortgage and which was valued at $104,000.00, and most of the personal property. For her share, Farrey received the remaining items of personal property and the proceeds from a court-ordered auction of the furniture from the home. The judgment also allocated the couple's liabilities. Under this preliminary calculation of assets and debts, Sanderfoot stood to receive a net award of $59,508.79, while Farrey's award would otherwise have been $1,091.90. To insure that the division of the estate was equal, the Court ordered Sanderfoot to pay Farrey $29,208.44, half the difference in the value of their net assets. Sanderfoot was

to pay this amount in two installments: half by January 10, 1987, and the remaining half by April 10, 1987. To secure this award, the decree provided that "Farrey shall have a lien against the real estate of [Sanderfoot] for the total amount of money due her pursuant to this Order of the Court, i.e. $29,208.44, and the lien shall remain attached to the real estate property ...until the total amount of money is paid in full." (App. to Pet. for Cert. 57a.)

Sanderfoot never made the required payments nor complied with any other order of the state court. Instead, on May 4, 1987, he voluntarily filed for Chapter 7 bankruptcy. Sanderfoot listed the marital home and real estate on the schedule of assets with his bankruptcy petition and listed it as exempt homestead property. Exercising his option to invoke the state rather than the federal homestead exemp-

tion, 11 USC §522(b)(2)(A), Sanderfoot claimed the property as exempt "to the amount of $40,000" under Wis. Stat.§ 815.20 (1989-1990).[1] He also filed a motion to avoid Farrey's lien under the provision in dispute, 11 USC §522(f)(1), claiming that Farrey possessed a judicial lien that impaired his homestead exemption. Farrey objected to the motion, claiming that §522(f)(1) could not divest her of her interest in the marital home.[2] The

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1. Section 815.20 provides in relevant part:
"Homestead exemption definition.
"(1) An exempt homestead as defined in s. 990.01(14) selected by a resident owner and occupied by him or her shall be exempt from execution, from the lien of every judgment and from liability for the debts of the owner to the amount of $40,000, except mortgages, laborers', mechanics' and purchase money liens and taxes and except as otherwsie provided.... The exemption extends to the interest therein of the tenants in common, having a homestead thereon with the consent of the cotenants, and to any estate less than a fee."

2. Farrey also objected to her former husband's valuation of the home at $82,750 in his bankruptcy filings. Neither the Bankruptcy Court, the District Court, or the Court of Appeals resolved this dispute on the merits.

Bankruptcy Court denied Sanderfoot's motion, holding that the lien could not be avoided because it protected Farrey's pre-existing interest in the marital property. In Re Sanderfoot, 83 BR 564 (ED Wis 1988). The District Court reversed, concluding that the lien was avoidable because it "is fixed on an interest of the debtor in the property." In Re Sanderfoot, 92 BR 802 (ED Wis 1988).

A divided panel of the Court of Appeals affirmed. In Re Sanderfoot, 899 F 2d 598 (CA 7 1990). The court reasoned that the divorce proceeding dissolved any pre-existing interest Farrey had in the homestead and that her new interest, "created in the dissolution order and evidenced by her lien, attached to Mr Sanderfoot's interest in the property." Id. at 602. Noting that the issue had caused a split among the Courts of Appeal, the court expressly relied on those decisions that it termed more "faith-

ful to the plain language of section 522(f)." Ibid. (citing In Re Pederson, 875 F 2d 781 (CA 9 1989); Maus v Maus, 837 F 2d 935 (CA 10 1988); Boyd v Robinson, 741 F 2d 1112, 1115 (CA 8 1984)(Ross, j., dissenting)).

Judge Posner, in his dissent, argued that to avoid a lien under §522(f), a debtor must have an interest in the property at the time the court places the lien on that interest. Judge Posner concluded that because the same decree that gave the entire property to Sanderfoot simultaneously created the lien in favor of Farrey, the lien did not attach to a pre-existing interest of the husband. The dissent's conclusion followed the result, though not the rationale, of Boyd, supra, In Re Borman, 886 F 2d 273 (CA 10 1989), and In Re Donahue, 862 F 2d 259 (CA 10 1988).

We granted certiorari to resolve the

the conflict of authority. 495 US ___, 111 S Ct 507, 112 L Ed 2d 519 (1990). We now reverse the Court of Appeals' judgment and remand.

II

Section 522(f)(1) provides in relevant part:

> "Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is -
>
> "(1) a judicial lien..."

The provision establishes several conditions for a lien to be avoided, only

one of which is at issue. See In Re Hart, 50 BR 956, 960 (Bkrtcy Ct Nev 1985). Farrey does not challenge the Court of Appeals' determination that her lien was a judicial lien, 899 F 2d at 603-605, nor do we address that question here. The court of Appeals also determined that Farrey had waived any challenge as to whether Sanderfoot was otherwise entitled to a homestead exemption under state law, id. at 603, and we agree. See Owen v Owen, ___US____, 111 S Ct 1833, ___ L Ed 2d ____(1991). The sole question presented in this case is whether §522(f)(1) permits Sanderfoot to avoid the fixing of Farrey's lien on the property interest that he obtained in the divorce decree.

[1] The key portion of §522(f) states that "the debtor may avoid the fixing of a lien on an interest in...property." Sanderfoot, following several Courts of Appeals, suggests that this phrase means that a lien

may be avoided so long as it is currently fixed on a debtor's interest. Farrey, following Judge Posner's lead, reads the text as permitting the avoidance of a lien only where the lien attached to the debtor's interest at some point after the debtor obtained the interest.

We agree with Farrey. No one asserts that the two verbs underlying the provision possess anything other than their standard legal meaning: "avoid" meaning "annul" or "undo", see Black's Law Dictionary 136 (6th Ed. 1990); H.R. Rep. No. 95-595, pp. 126-127 (1977), U.S. Code Cong. & Admin. News 1978, p.5787, and "fix" meaning to"fasten a liability upon," see Black's Law Dictionary, supra, at 637. The statute does not say that the debtor may undo a lien on an interest in property. Rather, the statute expressly states that the debtor may avoid "the fixing" of a lien on the debtor's interest in property. The

gerund "fixing" refers to a temporal event. That event - the fastening of a liability - presupposes an object onto which the liability can fasten. The statute defines this pre-existing object as "an interest of the debtor in property." Therefore, unless the debtor had the property interest to which the lien attached at some point before the lien attached to that interest, he or she can not avoid the fixing of the lien under the terms of §522(f)(1).[3]

This reading fully comports with the

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3. Other provisions of the Code likewise indicate that Congress used the term "fixing" to refer to the timing of an event. Section 545(1), for example, provides

"The Trustee may avoid the fixing of a statutory lien on the property of the debtor to the extent that such lien -

"(1) first becomes effective against the debtor -

"(A) when a case under this title concerning the debtor is commenced;

"(B) when an insolvency proceeding other than under this title concerning the debtor is commenced;

"(C) when a custodian is appointed or authorized to take or takes possession;

"(D) when the debtor becomes insolvent;

"(E) when the debtor's financial condition fails to meet a specified standard; or

"(F) at the time of an execution against property of the debtor levied at the instance of an entity other than the holder of such statutory lien."

11 USC 545(1) (emphasis added).

provision's purpose and history. See United States v Ron Pair Enterprises, Inc. 489 US 235, 242, 109 S Ct 1026, 1031, 103 L Ed 2d 290 (1989). Congress enacted §522(f) with the broad purpose of protecting the debtor's exempt property. See S. Rep. No 95-989, p. 77 (1978); H.R. Rep. No 95-595, supra, at 126-127. Ordinarily, liens and other secured interests survive bankruptcy. In particular, it was well settled when §522(f) was enacted that valid liens obtained before bankruptcy could be enforced on exempt property, see Louisville Joint Stock Land Bank, v Radford, 295 US 555, 582-583, 55 S Ct 854, 859-860, 79 L Ed 1593 (1935), including otherwise exempt homestead property, Long v Bullard, 117 US 617, 620-621, 6 S Ct 917, 918, 29 L Ed 1004 (1886). Congress generally preserved this principle when it comprehensively revised bankruptcy law with the Bankruptcy Reform Act of 1978, Pub. L.

95-598, 92 Stat. 2587, 11 USC § 522(c)(2)(A)(i). But Congress also revised the law to permit the debtor to avoid the fixing of some liens. See, e.g. 11 USC §545 (statutory liens).

Section 522(f)(1), by its terms, extends this protection to cases involving the fixing of judicial liens onto exempt property. What specific legislative history exists suggests that a principal reason Congress singled out judicial liens was because they are a device commonly used by creditors to defeat the protection bankruptcy law accords exempt property against debts. As the House Report stated:

> "The first right [§522(f)(1)] allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists to provide relief for an overburdened debtor. If a creditor beats the

> debtor into court, the debtor is nevertheless entitled to his exemptions." H. R. Rep. No 595, supra, at 126-127, U.S. Code Cong & Admin News 1978, pp. 6087-6088.

One factor supporting the view that Congress intended §522(f)(1) to thwart a rush to the courthouse is Congress' contemporaneous elimination of §67 of the 1898 Bankruptcy Act, 30 Stat. 564. Prior to its repeal, §67(a) invalidated any lien obtained on an exempt interest of an insolvent debtor within four months of the bankruptcy filing. The Bankruptcy Reform Act eliminated the insolvency and timing requirements. It is possible that Congress simply decided to leave exemptions exposed despite its long-standing policy against doing so. But given the legislative history's express concern over protecting exemptions, it follows instead that §522(f)(1) was in-

tended as a new device to handle the old provision's job by "giv[ing] the debtor certain rights not available under current law with respect to exempt property." H. R. Rep. No. 95-595, supra, at 126, U.S Code Cong. & Admin. News 1978, p. 6087.

Conversely, the text, history, and purpose of §522(f)(1) also indicate what the provision is not concerned with. It cannot be concerned with liens that fixed on an interest before the debtor acquired that interest. Neither party contends otherwise. Section 522(f)(1) does not state that any fixing of a lien may be avoided; instead, it permits avoidance of the "fixing of a lien on an interest of the debtor." If the fixing took place before the debtor acquired that interest, the "fixing" by definition was not on the debtor's interest. Nor could the statute apply given its purpose of preventing a

creditor from beating the debtor to the courthouse, since the debtor at no point possessed the interest without the judicial lien. There would be no fixing to avoid since the lien was already there. To permit lien avoidance in these circumstances, in fact, would be to allow judicial lienholders to be defrauded through the conveyance of an encumbered interest to a prospective debtor. See In Re McCormick, 18 BR 911, 913-914 (Bkrtcy Ct WD Pa 1982). For these reasons, it is settled that a debtor cannot use §522(f)(1) to avoid a lien on an interest acquired after the lien attached. See, e.g. In Re McCormick, supra; In Re Stephens, 15 BR 485 (Bkrtcy Ct WD NC 1981); In Re Scott, 12 BR 613 (Bkrtcy Ct WD Okla 1981). As before, the critical inquiry remains whether the debtor ever possessed the interest to which the lien fixed, before

it fixed. If he or she did not, §522(f)(1) does not permit the debtor to avoid the fixing of the lien on that interest.

III

(2) We turn to the application of §522(f)(1) to this case.

Whether Sanderfoot ever possessed an interest to which the lien fixed, before it fixed, is a question of state law. Farrey contends that prior to the divorce judgment, she and her husband held title to the real estate in joint tenancy, each possessing an undivided one-half interest. She further asserts that the divorce decree extinguished these previous interests. At the same time and in the same transaction, she concludes, the decree created new interests in place of the old: for Sanderfoot, ownership in fee simple of the house and real estate; for Farrey,

various assets and a debt of $29,208.44 secured by a lien on the Sanderfoot's new fee simple interest. Both in his briefs and at oral argument, Sanderfoot agreed on each point. (Brief for Respondent, 7-8; Tr. of Oral Arg. 39).

On the assumption that the parties characterize Wisconsin law correctly, Sanderfoot must lose. Under their view, the lien could not have fixed on Sanderfoot's pre-existing undivided half interest because the divorce decree extinguished it. Instead, the only interest that the lien encumbers is debtor's wholly new fee simple interest. The same decree that awarded Sanderfoot his fee simple interest simultaneously granted the lien to Farrey. As the judgment stated, he acquired the property "free and clear" of any claim "except as expressly provided in this [decree]." (App. to Pet. for Cert. 58a).

Sanderfoot took the interest and the lien together, as if he had purchased an already encumbered estate from a third party. Since Sanderfoot never possessed his new fee simple interest before the lien "fixed", §522(f)(1) is not available to void the lien.

The same result follows even if the divorce decree did not extinguish the couple's pre-existing interests but instead merely reordered them. The parties' current position notwithstanding, it may be that under Wisconsin law the divorce decree augmented Sanderfoot's previous interest by adding to it Farrey's prior interest. If the court in exchange sought to protect Farrey's previous interest with a lien, §522(f)(1) could be used to undo the encumbrance to the extent the lien fastened to any portion of Sanderfoot's previous surviving interest. This follows

because Sanderfoot would have possessed the interest to which that part of the lien fixed, before it fixed. But in this case, the divorce court did not purport to encumber any part of Sanderfoot's previous interest even on the assumption that state law would deem that interest to have survived. The decree instead transferred Farrey's previous interest to Sanderfoot and, again simultaneously, granted a lien equal to that interest minus the small of amount of personal property she retained. Sanderfoot thus would still be unable to avoid the lien in this case since it fastended only to what had been Farrey's preexisting interest, and this interest Sanderfoot would never have possessed without the lien already having fixed.[4]

4. Justice SCALIA does not join in this paragraph.

The result, on either theory, accords with the provisions main purpose. As noted the legislative history suggests that Congress primarily intended §522(f)(1) as a device to thwart creditors who, sensing an impending bankruptcy, rush to court to obtain a judgment to defeat the debtor's exemptions. That is not what occurs in a divorce proceeding such as this. Farrey obtained the lien not to defeat Sanderfoot's pre-existing interest in the homestead but to protect her own pre-existing interest in the homestead that was fully equal to that of her spouse. The divorce court awarded the lien to secure an obligation the court imposed on the husband in exchange for the court's simultaneous award of the wife's homestead interest to the husband. We agree with Judge Posner that to permit a debtor in these circumstances to use the Code to deprive a spouse of this protection would neither follow the language of the

statute nor serve the main goal it was designed to address.

IV

We hold that §522(f)(1) of the Bankruptcy Code requires a debtor to have possessed an interest to which a lien attached, before it attached, to avoid the fixing of the lien on that interest. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice KENNEDY, with whom Justice SOUTER joins, concurring.

I agree with the Court's holding that a debtor cannot use §522(f)(1) of

the Bankruptcy Code to avoid a lien on an interest the debtor acquired after the lien attached. I agree also with the Court's determination that respondent conceded what we all now know to be the key point in the case. In describing the effect of the Wisconsin Family Court's decree on the real property in question, the husband stated in his brief before this Court:

> "Prior to the judgment of divorce, the parties held title to the real estate in joint tenancy, each holding a pre-existing undivided one-half interest. At the point that the divorce court issued its property division determination, those property rights were wholly extinguished and new rights were put into place." Brief for Respondent 7-8.

This concession is fatal to the argument respondent must make to prevail here, which is that the judicial lien fixed upon his pre-existing interest in the property. With the case in this posture, though, the possibility arises that later cases, whether from Wisconsin or from some other jurisdiction, could yield a different result. This would depend upon the relevant state laws defining the estate owned by a spouse who had a pre-existing interest in marital property and upon state laws governing awards of property under a decree settling marital rights.

In this case, prior to the Family Court decree ordering the property division, respondent had a vested, present, and undivided interest in one-half the marital property. The relevant Wisconsin statutes, enacted when the State adopted substantial parts of the Uniform Marital

Property act, provide that "[a]ll property of spouses is presumed to be marital property," Wis. Stat. §766.31(2)(1989-1990), and "[e]ach spouse has a present undivided one-half interest in each item of marital property." Id. §766.31(3). Absent respondents concession, it would seem that the state court ddi not divest him of his pre-existing interest. At no place in its "Findings of Fact, Conclusions of Law, and Judgment of Divorce" did the court declare that respondent's predecree interests were extinguished. Rather, the decree declared that upon its effective date sole title to the property vested in respondent. It also gave respondent's wife a lien against the home to secure the debt he owed her to equalize the property settlement. Finally, it divested each party of "any and all right, title and interest in and to the property awarded to the other." App. to Pet. for

Cert. 58a. As I read these provisions, respondent obtained from his wife her one half interest in the home, while always retaining his one-half interest as well. Because no interest in the home, other than the lien, was awarded to respondent's wife, respondent was never divested of any interest.

This interpretation conforms to the result mandated if a marriage terminates without any decree for property division. Wisconsin law provides that "[a]fter a dissolution each former spouse owns an undivided one-half interest in the former marital property as a tenant in common." Wis Stat §766.75(1989-1990). So too, if one spouse were to make a voluntary transfer of his or her one-half interest to the otherspouse, I should not think it could be said that the transferee's prior interest had been extinguished. Rather, the transferee would retain his or her own

interest, and the two interests would be merged into a single estate. See Thauer v Smith, 213 Wis 91, 95, 250 NW 842, 844 (1933). A state law scheme in this pattern is to be distinguished, of course, from a regime in which a tenancy by the entirety is recognized and is deemed a single interest owned by the marital entity, a regime in which the estate dissolves when the marriage does. See McCormick v Mid-State Bank and Trust Co., 22 BR 997 (WD Pa 1982)(applying Pennsylvania law). Thus, it is not at all clear that as a matter of state law the judicial lien could not attach to the husband's predecree interest in his one-half of the marital property. If so, respondent could use §522(f)(1) to avoid at least part of his wife's lien.

The result the Court reaches consists with fairness and common sense. Since the

Wisconsin Family Court had the power to strip the husband of his interest altogether, it can be reasoned that the court granted him the entire property on the condition that his prior interest would terminate and that a lien would attach to a new interest in the whole. The problem with this argument, however, is that there is no indication in the record that the husband consented to the decree. A waiver of this sort may also be contrary to the non-waiver provision of §522(f).

Following this analysis, I believe the Bankruptcy Code may be used in some later case to allow a spouse to avoid otherwise valid obligations under a divorce court decree. Though adept drafting of property decrees or the use of court orders directing conveyances in a certain sequence might resolve the problem, it appears that congressional action may be necessary to avoid in some future

case the perhaps unjust result the Court today avoids having to consider only because of the fortuity of a litigant's concession. With these observations, I concur in the opinion and the judgment of the Court.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-3499

IN RE: DWIGHT H. OWEN

Debtor

DWIGHT H. OWEN

Plaintiff/Appellant

vs

HELEN OWEN

Defendant/Appellee

On Appeal from the United States District Court for the Middle District of Florida

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JUDGMENT ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES ON PETITION(S) FOR REHEARING AND SUGGESTION(S) FOR REHEARING EN BANC

Opinion May 14, 1992, 11th Cir., 19___, ___ F 2d ___.

Before: POWELL*, Associate Justice (Retired), TJOFLAT, Chief Judge, and RONEY, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

(Filed)
(U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
July 21, 1992
Miguel J. Cortez
Clerk)

*Honorable Lewis F. Powell, Jr., Associate Justice of the United States Supreme Court, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-3499

D. C. Docket No. 88-00404-CIV-T-17

IN RE: DWIGHT H. OWEN

Debtor

DWIGHT H. OWEN

Plaintiff/Appellant

vs

HELEN OWEN

Defendant/Appellee

Appeal

From the United States District Court

for the Middle District of Florida

Before POWELL*, Associate Justice (Retired), TJOFLAT, Chief Judge, and RONEY, Senior Circuit Judge.

JUDGMENT ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

This cause came to be heard on remand

from the Supreme Court of the United States;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment in this cause be and the same is hereby AFFIRMED.

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* Honorable Lewis F. Powell, Jr. Associate Justice of the United States Supreme Court, Retired, sitting by designation.

Entered: May 14, 1992

For the Court: Miguel J. Cortez, Clerk

By: /s/Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: Aug 27, 1992

FEDERAL

STATUTORY PROVISIONS INVOLVED

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11 U.S.C. § 522(b)

Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. In joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Bankruptcy Rules, one debtor may not elect to exempt property listed in paragraph (1) and the other debtor elect to exempt property listed in paragraph (2) of this subsection. If the parties can

not agree on the alternative to be elected, they shall be deemed to elect paragraph (1), where such election is permitted under the law of the jurisdiction where the case is filed. Such property is --

(1) property that is specified under subsection (d) of this section, unless the state law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; and

(B) any interest in property in which

the debtor had, immediately before the commencement of the case, an interest as tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.

11 U.S.C.§ 522(f)

Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is --

(1) a judicial lien;

11 U.S.C. §101

(36)"judicial lien" means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding;

FLORIDA

STATUTORY PROVISIONS INVOLVED

Chapter 222.20, Florida Statutes

In accordance with the provision of s. 522(b) of the Bankruptcy Code of 1978 (11 USC s522(b)), residents of this state shall not be entitled to the federal exemptions provided in s. 522(d) of the Bankruptcy Code of 1978 (11 USC s522(d)). Nothing herein shall affect the exemptions given to residents of this state by the State Constitution and the Florida Statutes.

Chapter 55.10, Florida Statutes (1967)

Judgments and decrees beome a lien on real estate in the county where rendered when the judgment or decree is recorded in the proper record of such county and in other counties when a certified copy thereof is recorded in the proper record of other counties.

FLORIDA

CONSTITUTIONAL PROVISIONS INVOLVED

Article X, Section 4, Florida Constitution

(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:

(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the

extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or his family;

(2) personal property to the value of one thousand dollars.

(b) These exemptions shall inure to the surviving spouse or heirs of the owner.

(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

Amended, general election, Nov. 7, 1972; general election, Nov. 6, 1984.

Article XI, Section 5, Florida Constitution

(c) If the proposed amendment or revision is approved by vote of the electors, it shall be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.